TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 95.

J. E. HURLEY, CYRUS LELAND, JR., AND WALTER REEVES, TRUSTEES IN BANKRUPTCY OF THE ESTATE OF THE MOUNT CARMEL COAL COMPANY, BANKRUPT, APPELLANTS,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY, AND THE CHEROKEE & PITTSBURG COAL & MINING COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 23, 1907.

(20,728.)

(20,728.)

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vs.

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INDEX.

	Page.
Caption	*a*
Transcript from the district court of the United States for the district of Kansas	1
Citation and acceptance of service	1
Petition in bankruptcy	2
Subpœna and marshal's return	4
Denial of bankruptcy	5
Order of adjudication and reference	5
Schedules	7
A-1—Statement of creditors holding securities	7
A-2—Statement of creditors whose claims are unsecured	10
B-2—Statement of personal property	11
Bond of trustees	19

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Page.
Order of referee approving bond of trustees 20
Certificate of the referee to the district judge 20
Amendment to petition of Atchison, Topeka & Santa Fe Railway Company 22
Petition for review of order off referee 22
Opinion of referee on petition of Atchison, Topeka & Santa Fe Railway Company *et al.* 24
Notice of application of Atchison, Topeka & Santa Fe Railway Co. *et al.* for leave to file intervening petition 32
Petition of Atchison, Topeka & Santa Fe Railway Co. *et al.* 33
Exhibit A—Lease and agreement between Osage Carbon Co. *et al.*, C. J. Devlin, and Atchison, Topeka & Santa Fe Ry. Co., October 1, 1896 37
B—Assignment of lease, Chas. J. Devlin to Mount Carmel Coal Company, March 1, 1897. 58
C—Agreement between Osage Carbon Co. *et al.*, Mount Carmel Coal Co., and Atchison, Topeka & Santa Fe Ry. Co., June 1, 1898 58
D—Agreement between Osage Carbon Co. *et al.*, Mount Carmel Coal Co., and Atchison, Topeka & Santa Fe Ry. Co., August 30, 1900 63
E—Partial report of account with receivers 68
Stipulation as to filing of intervening petition of Atchison, Topeka & Santa Fe Railway Co. *et al.* 70
Demurrer of receivers to petition of Atchison, Topeka & Santa Fe Ry. Co. *et al* 71
Answer of trustees to petition of Atchison, Topeka & Santa Fe Ry. Co. *et al* 71
Amended answer of trustees 72
Record of proceedings before referee 72
Admission as to copies of contracts 72
Testimony for Atchison, Topeka & Santa Fe Ry. Co. *et al.*, petitioners 72
Testimony of A. O. Wellman 72
Testimony of Cyrus Leland 86
Testimony for trustees 89
Testimony of Walter Reeves 89
Admission as to appointment of Walter Reeves as an additional receiver 92
Stipulation as to affidavit of W. H. Rossington 93
Affidavit of W. H. Rossington 93
Objections of trustees to affidavit of W. H. Rossington 96
Order of referee denying petition of Atchison, Topeka & Santa Fe Railway Co. *et al.* 98
Decree approving order of the referee, March 12, 1906 99
Opinion of the court 100
Petition for and order allowing appeal 112
Assignment of errors 114
Bond on appeal 116
Stipulation as to election and appointment of trustees 117
Clerk's certificate to transcript 118
Appearance of counsel for appellants 119
Appearance of Mr. Clifford Histed as counsel for appellees 119

Page.
Appearance of Mr. John S. Dean as counsel for appellees 120
Argument commenced 120
Order of submission 121
Opinion 121
Decree 129
Petition of appellees for allowance of appeal to Supreme Court United States and order allowing same 130
Assignment of errors 131
Supersedeas bond 133
Order approving bond on appeal 135
Citation and acknowledgment of service 135
Clerk's certificate to transcript 136

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1906, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the third day of December, A. D. 1906, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twelfth day of April, A. D. 1906, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Atchison, Topeka and Santa Fe Railway Company *et al.*, were Appellants, and J. E. Hurley *et al.*, Trustees in Bankruptcy, etc., were Appellees, which said transcript of record is in the words and figures following, to-wit:

1 In the District Court of the United States for the District of Kansas First Division.

In re The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy No. 816.

Citation.

To J. E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, and Clifford Histed and J. S. Dean, your Solicitors,—Greeting.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the First Division of the Judicial District of Kansas, wherein The Atchison, Topeka and Santa Fe Railway Company; The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, are appellants, and you, J. E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, are appellees, to show cause, if and there be, why the judgment rendered against the said appellants,as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, this 12th day of March in the year of our Lord one thousand nine hundred and six.

JOHN C. POLLOCK
United States District Judge, for the District of Kansas.

We accept service of above Citation this 12th day of March, 1906.

CLIFFORD HISTED
JOHN S. DEEN,
Solicitors for Appellees.

Filed March 12-1906. Morton Albaugh, Clerk. By F. L. Campbell, Dep. Clerk.

2 In the District Court of the United States for the District of Kansas First Division.

In the matter of Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

To the Honorable John C. Pollock, Judge of the District Court of the United States, for the District of Kansas:

The petition of C. E. Denham, C. S. Gill and J. Davis, all of Kansas City, Missouri, respectfully shows that the Mount Carmel Coal Company, of Topeka, Kansas, has for the greater portion of six months next preceding the date of filing this petition, had its principal place of business, resided and had its domicile at Topeka, in the County of Shawnee and State and District aforesaid, and owes debts to the amount of over one thousand dollars. That said Mount Carmel Coal Company is a corporation organized and existing according to law, and is engaged chiefly in mercantile pursuits, mining, buying and selling of coal. That your petitioners are creditors of said Mount Carmel Coal Company, having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of five hundred dollars. That the nature and amounts of your petitioners claims are as follows:

C. E. Denham, on an acceptance for seventeen hundred and twenty-four dollars, dated Topeka, Kansas, April 29, 1905, and payable sixty days thereafter, to the order of Joseph Fletcher, which acceptance has been duly assigned and said Denham is now the owner and holder thereof, said acceptance being drawn and accepted for value received passing to said Mount Carmel Coal Company.

3 C. S. Gill, on an acceptance for seventeen hundred and twenty-four dollars, dated Topeka, Kansas, April 29, 1905, and payable sixty days thereafter, to the order of Joseph Fletcher, which acceptance has been duly assigned and said Gill is now the owner and holder thereof, said acceptance being drawn and accepted for value received passing to said Mount Carmel Coal Company.

J. Davis, upon an acceptance for twenty-seven hundred and thirty-eight dollars, dated Topeka, Kansas, June 22, 1905, and payable sixty days after date to the order of Joseph Fletcher, which acceptance has been duly assigned and said Davis is now the owner and holder thereof, said acceptance being drawn and accepted for value received, passing to said Kansas City Coal & Coke Company.

The three acceptances above set out were all duly accepted by the Mount Carmel Coal Company, and all remain unpaid.

Your petitioners further represent that said Mount Carmel Coal Company is insolvent, and that within four months next preceding the date of this petition the said Mount Carmel Coal Company committed acts of bankruptcy, in that it did heretofore, to-wit, on various dates during the months of April, May and June, 1905, pay to various creditors various sums of money for the purpose of preferring such creditors over their other creditors, and that during said months of April, May and June 1905, and while insolvent, said Mount Carmel Coal Company did pay out many thousands of dollars to one C. J. Devlin without any consideration passing to said Mount Carmel Coal Company therefor, but wholly for the use and benefit of said Devlin.

Wherefore your petitioners pray that service of this petition with a subpoena may be made upon said Mount Carmel Coal Company as provided in the acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said acts.

4

C. E. DENHAM.
C. S. GILL.
J. DAVIS.
By W. S. McClintock, Karnes,
New & Krauthoff,
Their Attorneys.

State of Missouri,
County of Jackson—ss.

G. W. Solan being duly sworn, upon oath states that he is one of the attorneys for the petitioning creditors herein, and as such and for them makes this affidavit, being thereunto duly authorized. This affidavit is made by this affiant because the matters and facts hereinbefore set forth are more fully within the knowledge of this affiant than within the knowledge of any of the Petitioning creditors or any of the other officers, agents, or servants thereof. The matters and facts hereinbefore set forth are true.

G. W. SOLAN.

Subscribed and sworn before me this 28th day of July, 1905. My commission expires May 10th, 1908.

LATHROP KARNES. Notary Public.
Seal N. P. Jackson County, Missouri.

Endorsed: No. 816. In Re Mount Carmel Coal Company, Bankrupt. Involuntary Petition. Filed July 28, 1905. at 3:40 P. M. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk, U. S. District Court, District of Kansas.

Subpoena to Alleged Bankrupt.

5 United States of America, District of Kansas.
First Division.

To Mount Carmel Coal Company, in said District, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the District of Kansas, First Division, as a court of bankruptcy, we command and strictly enjoin you, laying all other matters aside, and notwithstanding any excuse, that you personally appear before our said District Court, to be holden at Topeka, in said District on the 17th day of August, A. D. 1905, then and there to answer to a petition filed by C. E. Denham, C. S. Gill and J. Davis, in our said court, praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf, And this you are in no wise to omit, under the pains and penalties of what may befall thereon.

Witness the Honorable John C. Pollock, Judge of the said Court and the seal thereof, at Topeka, this 28th of July, day A. D. 1905.

Seal U. S. D. C.

MORTON ALBAUGH.
Clerk U. S. District Court, Districtof Kansas.

By F. L. Campbell, Deputy Clerk.

U. S. Marshal's Return.

District of Kansas, ss. Received the within writ Topeka, Ks. the 28th day of July, A. D. 1905, and executed the same as follows, to-wit: Served on the within named Mount Carmel Coal Company by delivering to C. J. Devlin, President of said Company, personally, a true and certified copy of this writ with all endorsements thereon, at Topeka, Kansas, July 28,
6 1905. At the same time and place, and in like manner, I delivered to C. J. Devlin, President, an original copy of the petition in bankruptcy filed in this case.

WILLIAM H. MACKEY JR.
By B. F. FLENNIKEN,
Fees: $4.10. Chief Office Deputy.

Endorsed: No. 816. District Court United States, District of Kansas. C. E. Denham et al. vs. Mount Carmel Coal Company. Bankruptcy Subpoena. Returnable Aug. 12, 1905. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk. Filed July 29, 1905, Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk. Karnes, New & Krauthoff, Compt's Sols.

7 In the District Court of the United States for the District of Kansas First Division.

In the Matter of Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

At Topeka, in said District, on the 17th day of August, A. D. 1905.

And now the said Mount Carmel Coal Company appears and denies that it has committed the act of bankruptcy set forth in said petition, or that it is insolvent, and avers that it should not be declared bankrupt for any cause in said petition alleged, and it demands that the same may be inquired into by a jury.

MT. CARMEL COAL COMPANY,
By Chas. J. Devlin, Pt.

State of Kansas
County of———ss

I, Chas. J. Devlin, being duly sworn, upon his oath states that he is President of the Mount Carmel Coal Company, and makes this affidavit on its behalf; that he has read the foregoing denial of bankruptcy, and that the matters and things therein stated are true.

CHAS. J. DEVLIN.

Subscribed and sworn to before me this 31st day of July, A. D. 1905. My term expires 1-12-1907.

Seal N. P. C. P. BOLMAR,
Notary Public.

Endorsed: 816. In Re Mount Carmel Coal Company. Involuntary Bankruptcy. Denial in Bankruptcy. Filed August, 17, 1905. at 2-30 P. M. Morton Albaugh, Clerk. U. S. District Court, Dist. of Kansas. By F. L. Campbell, Deputy Clerk. Harkless, Crysler & Histed, Lawyers, Kansas City, Mo.

8 In the District Court of the United States for the District of Kansas First Division.

In the matter of Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Now on this day it appearing to the Court that heretofore there was filed in the District Court of the United States for the District of Kansas, Third Division, a petition that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, and that thereafter there was filed in the District Court of the United States for the District of Kansas, First Division, a petition that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of

Congress relating to bankruptcy, and that thereafter the District Court of the United States for the District of Kansas, Third Division, transferred the petition filed in that Court that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, to this court, it is ordered by the court that the petitions hereinbefore mentioned be, and the same are hereby consolidated as one proceeding.

And thereupon the petitions hereinbefore filed as hereinbefore recited that Mount Carmel Coal Company be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the petitioning creditors appearing by Karnes, New & Krauthoff and W. S. McClintock, their attorneys, and the Mount Carmel Coal Company appearing by Harkless, Crusler & Histed, its attorneys, and the demand for a jury trial filed hereinbefore having been withdrawn and the petitions having been heard and duly considered, Mount Carmel Coal Com-
9 pany is hereby declared and adjudged bankrupt accordingly

It is further ordered that this matter be referred to N. H. Loomis, who is specially named as special referee in bankruptcy of this court, to take such further proceedings therein as are required by said acts, and that said Mount Carmel Coal Company shall attend before said referee at his office in Topeka, Kansas, and henceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

Dated September 26, 1905.

JOHN C. POLLOCK, Judge.

Endorsed: Nos. 816 and 832. In Re Mount Carmel Coal Company, Bankrupt. Order of Adjudication. Filed Sep. 26, 1905. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

[10]

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

In the Matter of
MOUNT CARMEL COAL COMPANY,
Bankrupt. } In Bankruptcy.

SCHEDULES.

Pursuant to the direction of the Special Referee, we have prepared and herewith submit the attached schedules in the above matter, showing the names and addresses of all known creditors, the security held by them, if any, and the property of the bankrupt which has come to our knowledge.

In view of the fact that we, as Receivers, have prepared and filed, in the above estate, a report and statement, exhibiting (as fully as we are able to with the information at our command) the financial status of the bankrupt, we have not attempted to duplicate such matter in the attached schedules but refer to such report for additional information not disclosed herein.

Respectfully submitted,

J. E. HURLEY,
C. LELAND, JR.,
WALTER REEVES,
Receivers.

MOUNT CARMEL COAL COMPANY.

SCHEDULE A-1

STATEMENT OF CREDITORS HOLDING SECURITIES.

Name of Creditor, and Address.		Amount.
Alliance Realty & Securities Co., Kansas City, Mo.		$206,500.00
This Company claims to hold, as security for the above and other indebtedness of Chas. J. Devlin and his companies, the following collateral		
BONDS		
Crawford County Coal Co.	$150,000.00	
Toluca, Marquette & Northern R. R. Co.	130,000.00	
Galena, Frontenac & Northern R. R. Co.	30,000.00	
Devlin-Miller Coal Co.	128,000.00	
Bank of Topeka, Topeka, Kas.		3,000.00
It is understood that this Bank holds security for the above, but the nature and character of same the Receivers have been unable to ascertain		
City National Bank, Kansas City, Mo.		165,272.06
Receivers are unable to itemize the security held for the above.		

[11]

Name of Creditor, and Address.	Amount.
Continental National Bank, Chicago, Ill.	$88,635.00

This Bank holds, as security for the above, two orders—one dated May 5th, 1905, drawn by Mt. Carmel Coal Co. on E. Wilder, Treas. A. T. & S. F. Ry., reciting $35,000.00 note of that date and directing payment of same from June voucher, accepted by E. Wilder, Treas. A. T. & S. F. Ry. Similar order for same amount, dated June 6th, 1905, to cover $35,000.00 note given that day, maturing August 19th, 1905, accepted by E. Wilder, Treas. A. T. & S. F. Ry., payable from July voucher.

Corn Exchange National Bank, Chicago, Ill. 18,000.00

This Bank holds, as security for the above and other indebtedness of Chas. J. Devlin and his companies, the following collateral

BONDS.

Devlin Coal Company	$60,000.00
Toluca, Marquette & Northern R. R. Co.	236,000.00

STOCKS.

Devlin Coal Company	200 Shares.
Marceline Coal Co.	75 "
Marceline Mercantile Co.	25 "
Marquette Third Vein Coal Co.	1,250 "

Central Trust Co. of Illinois, Chicago, Ill. 44,200.00

Security as follows:

BONDS.

Devlin Coal Co.	$5,000.00
Marquette Third Vein Coal Co.	10,000.00

STOCKS.

First National Bank, of Topeka	30 Shares.
First National Bank, of Toluca, Ill.	120 "
Central National Bank, of Topeka	130 "

Central National Bank, Topeka, Kas. 143,170.00

Claims to hold, as security for the above and other indebtedness of Chas. J. Devlin and his companies, the following collateral:

BONDS.

Crawford County Coal Co.	$40,000.00
Devlin-Miller Coal Co.	35,000.00
Marquette Third Vein Coal Co.	41,000.00
Marquette, Spring Valley & Northwestern R. R. Co.	7,000.00
Toluca, Marquette & Northern R. R. Co.	158,000.00

STOCK.

Pittsburg & Midway Coal Co.	80,000.00

First National Bank, Topeka, Kas. 360,420.00

This Bank claims to hold the following collateral, to secure loans and drafts amounting to $540,905.65 on notes of Chas. J. Devlin and the Mt. Carmel Coal Co.:

STOCKS.

Mt. Carmel Mercantile Co.	$25,000.00
First National Bank, of Toluca, Ill.	18,000.00
Central Bank Bldg. Assoc., Topeka	6,800.00
Devlin Coal Co.	10,000.00
First National Bank, Topeka	86,500.00
Merchants National Bank, Topeka	6,600.00
Marceline Mercantile Co.	10,000.00
Bank of Topeka, Topeka	1,400.00
Collinsville Mercantile Co.	8,000.00
	$172,300.00

Name of Creditor, and Address.		Amount.
Also, 28 insurance policies on the life of Chas. J. Devlin, on which the cash surrender value at the time of assignment was	$60,894.99	
Also, deed from Chas. J. Devlin and wife to real estate in Crawford and Shawnee counties, Kansas, and La Salle, Putnam and Marshall counties, Illinois.		
Also, the following stocks and bonds:		
Crawford County Coal Co.	203,000.00	
Toluca, Marquette & Northern R. R. Co.	20,000.00	
Devlin-Miller Coal Co.	98,000.00	
Galena, Frontenac & Northern R. R.	11,000.00	
Marquette, Spring Valley & Northwestern R. R. Co.	10,000.00	
STOCKS.		
Mt. Carmel Mercantile Co.	4,300.00	
Devlin-Miller Coal Co.	125,000.00	
Toluca, Marquette & Northern R. R. Co.	125,000.00	
First National Bank, Leavenworth, Kan.		$10,000.00
Security as follows:		
BONDS.		
Devlin Coal Co.	12,000.00	
STOCKS.		
First National Bank, Toluca, Ill.	50 Shares.	
Central National Bank Bldg., Topeka	2 Shares.	
Fourth National Bank, St. Louis, Mo.		120,000.00
This Bank holds, as security for the above and other indebtedness of Chas. J. Devlin and companies, the following collateral		
BONDS.		
Toluca, Marquette & Northern R. R. Co.	$10,000.00	
Devlin Coal Company	35,000.00	
STOCKS.		
First National Bank, of Topeka	486 Shares.	
Central National Bank, Topeka	405 Shares.	
First National Bank, Toluca, Ill.	10 Shares.	
This Bank has also disposed of the following collateral which it held:		
420 Shares, American National Bank, Kansas City.		
150 Shares, National Bank of Commerce, Kansas City.		
500 Shares, Fourth National Bank, St. Louis, Mo.		
Leavenworth National Bank, Leavenworth, Kas.		15,000.00
Secured by order on Treasurer of Santa Fe System for same amount.		
National Bank of Commerce, Kansas City, Mo.		83,506.00
This Bank is supposed to hold security for the above, but the nature and character of same the Receivers have been unable to ascertain.		
Total		$1,257,703.00

SCHEDULE A 2.

STATEMENT OF CREDITORS WHOSE CLAIMS ARE UNSECURED

Name of Creditor, and Address.	Amount.
Adams Bros., Topeka, Kas.	$18.50
A. T. & S. F. Ry. Co., Topeka, Kas.	79,371.20
American National Bank, Kansas City, Mo.	54,502.00
B.-R. Electric & Telephone Mfg. Co., Kansas City, Mo.	170.68
Beasley & Miller, Pittsburg, Kas.	82.87
Borden & Selleck Co., Kansas City, Mo.	5.00
Bowman Furniture Co., Pittsburg, Kas.	93.00
Braden, W. H., Pittsburg, Kas.	9.00
Cherokee & Pittsburg Coal & Mining Co., Topeka, Kas.	17,714.03
Chicopee Drug Co., Chicopee, Kas.	1.00
Clark, Geo. A., Topeka, Kas.	24.00
Chicopee Lumber Co., Chicopee, Kas.	190.47
Coughlin Hardware Co., Topeka, Kas.	4,576.33
Crowell, T. J., Pittsburg, Kas.	21.05
Craig, Robt., Osage City, Kas.	52.92
Robert Craig, Supt., Osage City, Kas.	6.15
Crane Co., Kansas City, Mo.	529.78
Du Pont Co., E. I., Kansas City, Mo.	6,417.10
Duncan Foundry & Machine Works, Alton, Ill.	1,465.71
Devlin, Chas. J., Topeka, Kas.	8,786.66
Crawford County Light, Heat, Water & Power Co., Frontenac, Kas.	600.00
Crawford County Coal Co., Topeka, Kas.	6,869.40
First National Bank, Toluca, Ill.	10,620.00
Fairbanks, Morse & Co.	.....
City Water Works, Topeka, Kas.	.....
Edison Electric Illuminating Co., Topeka, Kas.	.....
Garlock Packing Co., 908 N. Second St., St. Louis, Mo.	101.21
Goodman Mfg. Co., Halstead St. and 18th Place, Chicago.	5,803.20
Great Western Mfg. Co., Leavenworth, Kas.	109.40
Hall Lithographing Co., Topeka, Kas.	493.15
Hirsch Rolling Mill Co., St. Louis, Mo.	3,066.48
Hood & Sons Implement Co., Pittsburg, Kas.	23.65
Hogeboom, D., Pittsburg, Kas.	1.25
Independent Telephone Co., Topeka, Kas.	1.90
Jones & Laughlin Steel Co., Chicago, Ill.	1,081.69
Joplin Machine Works, Joplin, Mo.	134.50
Keuffel & Esser Co., 111 Madison St., Chicago, Ill.	11.12
Kansas City Coal & Coke Co., Kansas City, Mo.	.....
Kinney Secret Service Bureau, Topeka, Kas.	930.00
Kitchen, J. H., Pittsburg, Kas.	62.50
Krauss & Sons, O., 224 Kas. Ave., Topeka, Kas.	403.00
Mo. & Kas. Tele. Co., Pittsburg, Kas. (Estd.)	369.05
Mo. & Kas. Tele. Co., Topeka, Kas.	583.90
Merchants National Bank, Topeka, Kas.	2,000.00
Mt. Carmel Mercantile Co., Topeka, Kas.	53,051.72
Marceline Coal Co., Marceline, Mo.	40,867.09
McNeal & Co., Joplin, Mo.	127.52
McGraw & Co., M., Newton, Kas.	297.64
New Amsterdam Casualty Co., Chicago, Ill.	1,111.94
Pittsburg Light & Power Co., Pittsburg, Kas.	23.05
Pittsburg Hardware Co., Pittsburg, Kas.	9.85
Pittsburg Hydraulic Stone Co., Pittsburg, Kas.	36.00
Pittsburg Lumber Co., Pittsburg, Kas.	56.75
Pittsburg Sewer Pipe & Conduit Co., Pittsburg, Kas.	24.33
Pittsburg Vitrified Paving & Building Brick Co., Pittsburg, Kas.	14.30
Reliance Machine & Tool Works, St. Louis, Mo.	229.70
Southwestern Fuel Co., Topeka, Kas.	.....

[14]

Name of Creditor, and Address.	Amount.
Standard Oil Co., Kansas City, Mo	$4,006.00
Sparks Bros., 17th and Genessee, Kansas City, Mo	7,160.00
Scott, Dr. M. K., Frontenac, Kas	185.00
Southwestern Interstate Coal Operators Assoc., 218 Gibraltar Bldg., Kansas City	112.32
Sulphur Springs Lumber & Tie Co., Sulphur Springs, Ark	1,187.51
Toluca Lumber & Hardware Co., Toluca, Ill	1,676.43
Thiesing, J. H., Pittsburg, Kas	9.00
Union Lime & Cement Co., Pittsburg, Kas	51.20
United Iron Works Co., Pittsburg, Kas	501.04
Wells Fargo & Co., Express, Topeka, Kas	9.53
Western Union Telegraph Co., Topeka, Kas	33.13
Total	$318,473.91

SCHEDULE B-2—PERSONAL PROPERTY.

This Company owns no real estate or coal deposits, but is simply an operating company, which has for 8 years past worked under contracts and leases with The Atchison, Topeka & Santa Fe Ry. Co. and said Ry. Co.'s affiliated Coal Companies—the Cherokee & Pittsburg Coal & Mining Co. and The Osage Carbon Co. Operations are still carried on under the agreements referred to in extracting coal from lands owned by the last named coal companies, and from coal deposits owned jointly by the said Cherokee Company and Crawford County Coal Company. Coal is also being mined through Shaft No. 9 from lands owned by Devlin-Miller Coal Company.

Said agreements permitted Mount Carmel Coal Company to use the mining facilities and equipment owned by the Cherokee and Osage companies in connection with the then existing shafts, likewise the use in new shafts of parts removed from shafts dismantled; and provided that all new shafts in other respects should be opened and equipped at the expense of Mount Carmel Company.

SCHEDULE B-2—PERSONAL PROPERTY.

INVENTORY OF SHAFTS, APPURTENANT STRUCTURES AND MACHINERY, JULY 7, 1905.

MINE NO. 5, CHICOPEE.

		Value.
1	Double Hoisting Engine, direct connected, cylinder 22 in. by 36 in., drum 8 ft. diameter, with stone foundation 24 ft. by 24 ft. by 12 ft.	$5,000.00
4	Steam Boilers, installed, at $650 each	2,600.00
1	Boiler House	1,000.00
1	Locomotive Boiler	400.00
1	Upright Boiler	125.00
1	Hoisting Engine House	1,000.00
	Fan House, Fan, Engine and Foundation	800.00
	Deep Well	1,000.00
1	Pump	125.00
400	Feet 5¼-in. Casing	255.00
300	Feet 4¼-in. Casing	180.00
1	Working Barrel (brass)	37.50
1	Hooker Pump No. 10	250.00
2	Hooker Pumps No. 6, at $150	300.00
1	Wells Pump No. 6	150.00
1	Boiler Shell Oil Tank	50.00
2	Tipple Scales	125.00
4	R.-R. Track Scales, 50 ft., Installed	3,540.00
2	Cages	300.00
2	Hoisting Cables and Sockets	225.00
2	Sheave Wheels	125.00
3	Injectors	75.00
1	Reservoir for Water Supply	400.00
1	Steam Shovel Engine	350.00
	Tower, Tipple and Connecting Trestle, complete	7,600.00
3	Shaker Screens, "Diamond" Bars	2,730.00
1	Shaker Engine	300.00
	Blacksmith Shop, "Building"	400.00
	Blacksmith Shop, Equipment	600.00
	Powder House	75.00
	Powder Magazine, "stone"	800.00
	Hose	80.00
2	Wind Mills	250.00
1	Oil Filter	27.00
	1150 ft. 1-in., 750 ft. 2-in., 750 ft. 3-in., 1600 ft. 4-in., 90 ft. 5-in. Pipe	839.40
1	Oil House	35.00
1	Water Tank	30.00
1	Store House	75.00
1	Stable	40.00
	Dynamo Room	300.00
	Generator, Engine, Switchboard, Motor and Installation	6,000.00
	Shaft 24 ft. by 9 ft. by 80 ft., Timbered with 6-in. by 8-in.	1,200.00
	Air Shaft 18 ft. by 8 ft. by 80 ft., Timbered with 6-in. by 8-in.	960.00
	Sinking of Main Shaft	2,000.00
	Sinking of Air Shaft	1,500.00
	Shaft Bottom and Parting on each side thereof	2,000.00
	No. 5½ Development Shaft	1,000.00

IN MINE.	Value.
1 Blacksmith Shop	150.00
3 Stables	750.00
350 ft. 1-in., 160 ft. 3-in., 3750 ft. 2-in. Piping	427.70
Total	$48,581.60

MINE NO. 6, FRONTENAC.

1 Double Hoisting Engine, direct connected, cylinders 14 in. by 18 in., drum 4 ft. diameter, with stone foundation 16 ft. by 20 ft. by 10 ft.	$3,000.00
1 Double Hoisting Engine House	550.00
4 Steam Boilers, installed, at $650 each	2,600.00
1 Boiler House	800.00
1 Fan House, Fan, Engine and Foundation	800.00
1 Hooker Pump No. 6	150.00
1 Hooker Pump No. 12	400.00
1 Duplex Pump	125.00
1 Boiler Shell Oil Tank	50.00
2 Tipple Scales	125.00
4 R. R. Track Scales	3,540.00
2 Cages, Self Dump	450.00
2 Hoisting Cables and Sockets	170.00
2 Sheave Wheels	110.00
2 Injectors	50.00
Tower, Tipples, Trestle and Piers	3,600.00
1 Shaker Screen	500.00
1 Shaker Engine	300.00
1 Blacksmith Shop, Building	350.00
Blacksmith Shop, Equipment	600.00
1 Powder House	75.00
1 Powder Magazine, stone	800.00
400 ft. 1½-in., 250 ft. 3-in., 360 ft. 2-in., 75 ft. 5-in., 60 ft. 6-in. Pipe,	196.25
1 Oil Filter	27.50
Dynamo Room	300.00
Generator, Engine, Switchboard, Motor and Installation	6,000.00
1 Norwalk Compressor	3,600.00
1 Wind Mill	175.00
Shaft 8 ft. by 18 ft. by 90 ft., Timbered with 6-in. by 8-in	1,100.00
Air Shaft 7 ft. by 16 ft. by 90 ft., Timbered with 6-in by 8-in	800.00
Sinking of Main Shaft	1,080.00
Sinking of Air Shaft	1,000.00
Shaft Bottom and Parting each side thereof	2,000.00
1 Oil House	50.00
1 Store House	40.00
1 Store House	35.00
1 Sand House	30.00

IN MINE.	
4 Stables	750.00
Blacksmith Shop	150.00
250 ft. 1½-in., 3.000 ft. 2-in., 520 ft. 3-in., 600 ft. 4-in. Pipe	617.90
Total	$37,096.65

MINE NO. 8, CHICOPEE.

1 Double Hoisting Engine, direct connected, cylinders, 14 in. by 18 in., drum 4 ft. diameter, with stone foundation 16 ft. by 20 ft. by 10 ft.	$3,000.00
1 Double Hoisting Engine House	550.00
3 Steam Boilers, installed, at $650	1,950.00
1 Steam Boiler House	1,000.00

	Value.
Fan House, Fan, Engine and Foundation	800.00
1 Deep Well	1,000.00
1 Pump	125.00
400 ft. 5¼-in. Casing	255.00
300 ft. 4¼-in. Casing	180.00
1 Working Barrel (brass)	37.50
2 Hooker Pumps No. 6	300.00
1 Duplex Pump 6x4x6	150.00
1 Boiler Shell Oil Tank	50.00
2 Tipple Scales	125.00
4 R. R. Track Scales, 50-ft., installed	3,540.00
3 Cages, Self Dump	675.00
2 Hoisting Cables and Sockets	170.00
2 Sheave Wheels	110.00
2 Injectors	50.00
2 Reservoirs for Water Supply	300.00
Tower, Tipple, Trestles and Piers	3,500.00
1 Shaker Screen	500.00
1 Shaker Engine	300.00
Blacksmith Shop, "Building"	300.00
Blacksmith Shop, Equipment	400.00
1 Powder House	75.00
1 Powder Magazine, "Stone"	800.00
Hose	60.00
500 ft. 1-in., 450 ft. 1½-in., 550 ft. 2-in., 1,500 ft. 2½-in., 500 ft. 4-in. Pipe	506.50
Shaft, 8 ft. by 18 ft. by 90 ft., Timbered with 6-in. by 8-in	1,080.00
Air Shaft, 7 ft. by 16 ft. by 90 ft., timbered with 6-in. by 8-in	810.00
Sinking Main Shaft	1,080.00
Sinking Air Shaft	1,000.00
Shaft Bottom and Parting each side thereof	2,000.00
IN MINE.	
4 Stables	750.00
500 ft. 3-in., 150 ft. 2-in. Pipe	125.00
Total	$27,654.00

MINE NO. 9, FRONTENAC.

1 Double Hoisting Engine, direct connected, cylinders 14-in. by 18-in., drum 4 ft. diameter, with stone foundation 16 ft. by 20 ft. by 10 ft.	$3,000.00
1 Double Hoisting Engine House	550.00
2 Boilers, installed, at $650	1,300.00
1 Boiler House	1,000.00
1 Mounted Boiler and Engine	600.00
Fan House, Fan, Engine and Foundation	800.00
3 Duplex Pumps	375.00
2 Tipple Scales	125.00
4 R. R. Track Scales	3,540.00
2 Cages, Self Dump	450.00
2 Hoisting Cables and Sockets	170.00
2 Sheave Wheels	110.00
2 Injectors	50.00
1 Reservoir for Water Supply	200.00
Tower, Tipple, Trestles and Piers	2,920.00
1 Shaker Screen	500.00
1 Shaker Engine	300.00
1 Blacksmith Shop, "Building"	300.00
Blacksmith Shop "Equipment"	400.00

[18]

	Value.
1 Pipe Cutting Machine and Threader	200.00
1 Powder House	50.00
1 Powder Magazine, stone	800.00
Hose	55.00
350 ft. 1½-in., 1900 ft. 2½-in., 100 ft. 5-in., 600 ft. 2-in. Pipe	340.50
Shaft 8 ft. by 18 ft. by 90 ft., Timbered with 6-in. by 8-in.	1,050.00
Air Shaft 7 ft. by 16 ft. by 90 ft., Timbered with 6-in. by 8-in.	820.00
Sinking of Shaft	1,080.00
Sinking of Air Shaft	1,000.00
Shaft Bottom and Parting each side thereof	2,000.00
IN MINE.	
3 Stables	300.00
300 ft. 2½-in., 100 ft. 2-in. Pipe	58.00
Total	$24,443.50

SHAFT NO. 10, FRONTENAC.

Sinking two Shafts, 6 ft. by 12 ft. by 60 ft.	$1,200.00
Timbering two Shafts	250.00
1 Gin Hoist	100.00
1 2 Horse Hoist	100.00
Total	$1,650.00

TELEPHONE SYSTEM.

Private Telephone System connecting Frontenac office with the several mines	$300.00

IN OSAGE COUNTY.

1 Drilling Machine	$5.00
3 Thread Bars	5.45
6 Machine Boxings	4.68
1 Hoisting Cable	28.00
1 Hoisting Cable Socket	2.50
1 Hatchet	.60
1 Wrench	.85
2 8-in Blocks and Rope	10.00
	$57.08

RECAPITULATION.

Mine No. 5, Chicopee	$48,581.60
Mine No. 6, Frontenac	37,096.65
Mine No. 8, Chicopee	27,654.00
Mine No. 9, Frontenac	24,443.50
Shaft 10, Frontenac	1,650.00
Telephone System to Mines	300.00
Osage County Mines	57.08
	$139,782.83

SCHEDULE B-2—PERSONAL PROPERTY.

INVENTORY OF SUNDRY ITEMS OF MINE EQUIPMENT JULY 7, 1905.

MINE NO 5, CHICOPEE.

		Value.	
1	Wagon	$60.00	
1	Set Double Harness	25.00	
1	Cart and Harness	65.00	
	Mine Props, at pit head	350.00	
450	Pit Cars, in mine, at $22.50 each	10,125.00	
55	Sets Mule Harness, in mine, at $5.00 each	275.00	
5	Water Cars, in mine, at $30.00 each	150.00	
2	Oil Cars, in mine, at $25.00 each	50.00	
	Rails in tracks, in mine	15,063.00	
	Switches laid, in mine	2,175.00	
	Ties in tracks, in mine	6,606.37	
			$34,944.37

MINE NO. 6, FRONTENAC.

1	Wagon	$60.00	
2	Sets Harness	25.00	
1	Cart and Harness	65.00	
	Mine Props, at pit head	280.00	
500	Pit Cars, in mine, at $22.50 each	11,250.00	
35	Sets Mule Harness, in mine, at $5.00 each	175.00	
4	Water Cars, in mine, at $30.00 each	120.00	
1	Oil Tank Car, in mine	25.00	
	Rails in tracks, in mine	9,650.50	
	Switches laid, in mine	1,330.00	
	Ties in tracks, in mine	3,985.80	
			26,966.30

MINE NO 8, CHICOPEE.

1	Wagon	$60.00	
1	Set Harness, double	25.00	
1	Cart and Harness	65.00	
	Mine Props, at pit head	220.00	
390	Pit Cars, in mine, at $22.50 each	8,775.00	
50	Sets Mule Harness, in mine, at $5.00 each	250.00	
2	Water Cars, in mine, at $30.00 each	60.00	
	Rails in tracks, in mine	14,581.52	
	Switches laid, in mine	2,420.00	
	Ties in tracks, in mine	6,395.50	
			32,852.02

MINE NO. 9, FRONTENAC.

1	Wagon	$60.00	
1	Set Harness, double	25.00	
1	Cart and Harness	60.00	
	Mine Props, at pit head	285.00	
200	Pit Cars, in mine, at $22.50 each	4,500.00	
23	Sets Mule Harness, in mine, at $5.00 each	115.00	
2	Water Cars, in mine at $30.00 each	60.00	
	Rails in tracks, in mine	7,467.00	
	Switches laid, in mine	1,400.00	
	Ties in tracks, in mine	3,145.45	
			17,117.45

IN OSAGE COUNTY.	Value.
5 Sets Mule Harness, at $4.00 each	$20.00
	$111,900.14
2 Oil Tank (R. R.) Cars Nos. 1 and 2	2,000.00
	$113,900.14

SCHEDULE B-2—PERSONAL PROPERTY.

INVENTORY OF LIVE STOCK EQUIPMENT JULY 7, 1905.

AT FRONTENAC AND CHICOPEE.

	Value.	
Mine No. 5, No. of Mules in Mine, 54	$5,400	
Mine No. 6, No. of Mules in Mine, 31	3,100	
Mine No. 8, No. of Mules in Mine, 45	4,500	
Mine No. 9, No. of Mules in Mine, 21	2,100	
151		$15,100
Shaft No. 5, Wagon Team, 2 Mules	$200	
Shaft No. 5, Cart Mule, 1 Mule	100	
Shaft No. 6, Cart Mule, 1 Mule	100	
Shaft No. 6, Wagon Team, 2 Horses	250	
Shaft No. 8, Wagon Team, 2 Mules	200	
Shaft No. 9, Wagon Team, 2 Mules	200	
Shaft No. 9, Cart Mule, 1 Mule	100	
		1,150
In Barn Yard, 1 Old Horse	$45	
In Barn Yard, 5 Crippled Mules	200	
		245
		$16,495

AT OSAGE.

6 Blind Horses	$270	
5 Small Mine Mules	300	
		570
Total		$17,065

SCHEDULE B-2—PERSONAL PROPERTY.

RECAPITULATION OF SUPPLIES ON HAND JULY 7, 1905.

At Frontenac and Chicopee	$15,023.17
In Osage County	2,468.87
Stationery in Offices at Frontenac, Chicopee and Topeka, not listed (estimated)	100.00
Total	$17,592.04

SCHEDULE B-2—PERSONAL PROPERTY.

[21]

SCHEDULE OF ACCOUNTS RECEIVABLE AT JULY 7, 1905.

OWING BY OTHER "DEVLIN" COS.

Debtor.	Amount.
Devlin-Miller Coal Co.	$31,980.24
Kansas City Coal & Coke Co.	25,567.41
Toluca, Marquette & Northern R. R. Co.	7.35
Toluca Mercantile Co.	12,343.68
Total.	$69,898.68

OWING BY OUTSIDE PARTIES.

Debtor.	Amount.
Butterly, J. P.	$1,304.20
Hutchinson Kansas Salt Co.	1,789.77
Jackson-Walker Coal & Material Co.	1,329.55
Kansas City Belt Line.	2,499.69
Southwestern Fuel Co.	32,776.30
Total.	$39,699.51

SCHEDULE B-2—PERSONAL PROPERTY.

MEMO. OF UNCONSIGNED COAL ON HAND JULY 7, 1905.

AT CHICOPEE.

Mine No. 5, 31 Cars, containing	751.35 tons "Mill," at 60c.,	$450.81	
In Boiler Room	10.00 tons "Mill," at 60c.,	6.00	
Mine No. 8, 43 Cars, containing	1,051.40 tons "Mill," at 60c.,	630.84	
In Boiler Room	9.00 tons "Mill," at 60c.,	5.40	
	1,821.75		$1,093.05

AT FRONTENAC.

Mine No. 6, 4 Cars, containing	91.10 tons "Nut," at $1.00,	$91.10	
7 Cars, containing	165.55 tons "Mill," at 60c.,	99.33	
In Boiler Room	10.50 tons "Mill," at 60c.,	6.30	
Mine No. 9, 27 Cars, containing	671.90 tons "Mill," at 60c.,	403.14	
In Boiler Room	11.00 tons "Mill," at 60c.,	6.60	
	950.05		606.47

AT BURLINGAME AND OSAGE

Nil.

Total. $1,699.52

#816. In re Mount Carmel Coal Co. Bankrupt. Schedules Filed Oct. 19, 1905 Morton Albaugh, Clerk.

Bond of Trustees.

22 In the District Court of the United States for the District of Kansas. First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Know all men by these presents: That we, James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as principals, and the Federal Union Surety Company, a corporation, of Indianapolis, Indiana, as surety, are held and firmly bound unto the United States of America in the sum of Fifty Thousand Dollars ($50.000.00), in lawful money of the United States, for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators, jointly and severally, by these presents.

Signed and sealed this 30th day of Dec. A. D. 1905.

The condition of this obligation is such, that whereas the above named James E. Hurley, Cyrus Leland, Jr., and Walter Reeves were, on the 19th day of December. A. D. 1905, appointed trustees in the case pending in bankruptcy in said court, wherein the estate of the Mount Carmel Coal Company is the bankrupt, and they, the said James E. Hurley, Cyrus Leland Jr. and Walter Reeves have accepted said trust with all the duties and obligations pertaining thereto:

Now, therefore, if the said James E. Hurley, Cyrus Leland Jr. and Walter Reeves, trustees as aforesaid, shall obey such orders as said court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets and effects of the estate of said bankrupt which shall come into their hands and possession, and shall in all respects faithfully perform all their official duties as said trustees,
23 then this obligation to be void; otherwise to remain, in full force and virtue

J. E. HURLEY,
C. LELAND, Jr.,
WALTER REEVES.
FEDERAL UNION SURETY COMPANY.
Seal
F. U. S. Co.
By R. W. Blair
Resident Vice-President.
Attest: I. L. BETZER,
Resident Assistant Sec'y.

Signed and sealed in presence of
E. M. Griggs, Witness to signature of Walter Reeves.
E. M. Griggs, Witness of J. E. Hurley,
Witness to signature, W. B. Collinson.

At a Court of Bankruptcy held in and for the Dis-
24 trict of Kansas, First Division, at Topeka, this first day of January, 1906.

Before N. H. Loomis Special Referee in Bankruptcy.

In the District Court of the United States for the District of Kansas, First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt. In Bankruptcy.

It appearing to the Court that the above named The Mount Carmel Coal Company was adjudicated a bankrupt by this court on the 26th day of September, 1905, on a petition filed on the 17th day of July, 1905; that J. E. Hurley, Cyrus Leland Jr. and Walter Reeves were duly appointed trustees of the estate of the said bankrupt at an adjourned session of the first creditors' meeting of said estate, held upon the 19th day of December, 1905; that they were duly notified of their appointment as such trustees and signified their acceptance of said appointment; and it further appearing that the time within which they were required to give bond as trustees was extended five days beyond the original ten days fixed by law for the giving of bond, and that within the time so fixed the said Trustees furnished a bond with sureties for the faithful performance of their official duties, in the amount fixed by the order of the court, to-wit, in the sum of fifty thousand dollars ($50,000), it is ordered that the said bond be and the same is hereby approved.

N. H. LOOMIS,
Special Referee in Bankruptcy.

Endorsed: No. 816. In the matter of the Mount Carmel Coal Company, Bankrupt. Bond of Trustees and Approval of Referee. Approved and filed Jan'y 1, 1906, N. H. Loomis, Referee. Filed Jan. 3, 1906. Morton Albaugh, Clerk, By F. L. Campbell, Deputy Clerk.

In the District Court of the United States for the Dis-
25 trict of Kansas. First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt. In Bankruptcy.

On petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal & Mining Company.

I, N. H. Loomis, Special Referee of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, The Atchison, Topeka & Santa Fe Railway Company, the Osage Carbon Company, and The Cher-

okee & Pittsburg Coal & Mining Company presented a petition whereby they prayed for an order upon the Receivers requiring them to deliver to The Atchison, Topeka & Santa Fe Railway Company a certain amount of coal to carry out the provisions of a certain contract, or authorize the said petitioners to cancel said contract and to take possession of the property referred to therein, and that the relief prayed for in said petition was after full consideration denied.

The precise questions involved in said petition, as well as the findings and conclusions of the Referee, are set forth in the opinion of the Referee attached to the application of the petitioners for a review.

The application for a review has been allowed by the Referee, and the questions involved are hereby certified to the Judge for his opinion thereon.

In order that the Judge may have a full and complete understanding of the points involved, the Referee includes
26 in the record certified to the Judge the following:

1. Petition for review of the Atchison, Topeka & Santa Fe Railway Company, et al, to which is attached an amendment to the original petition.

2. Opinion of the Referee.

3. Brief on intervening petition and proceedings of the Atchison, Topeka & Santa Fe Ry.

4. Petition of The Atchison, Topeka & Santa Fe Ry. Co. et al, to which is attached a notice to the Receivers.

5. Stipulation filed December 15, 1905.

6. Demurrer of the Receivers.

7. Answer of the Trustees.

8. Amended answer of the Trustees.

9. Transcript of evidence.

10. Stipulation with respect to affidavit of W. H. Rossington.

11. Affidavit of W. H. Rossington.

12. Objections filed by the Trustees to the affidavit of W. H. Rossington.

13. Points and authorities on behalf of the Trustees.

14. Order of Referee denying relief prayed for.

N. H. LOOMIS,
Special Referee.

Dated February 10, 1906.

27 In the District Court of the United States for the District of Kansas, First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Petitition of the Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company.

Amendment to Petition.

The petitioner, The Atchinson, Topeka & Santa Fe Railway Company respectfully shows herein that since the filing of its above entitled petition, the said J. E. Hurley, Cyrus Leland and Walter Reeves have been appointed trustees in bankruptcy by the creditors of said Mount Carmel Coal Company, and have ceased to be receivers.

Wherefore, the petitioner prays that it may have the same relief against said trustees that it prayed for against the said parties as receivers; that this amendment is made by agreement with counsel representing said trustees and receivers.

WM. R. SMITH
O. J. WOOD.
Attorneys for Petitioner, The Atchison, Topeka & Santa Fe Railroad Company.
ROBT. DUNLAP,
Of Counsel.

28 In the District Court of the United States for the District of Kansas, First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

On petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and the Cherokee & Pittsburg Coal and Mining Company.

To Hon. N. H. Loomis, Referee in Bankruptcy:

Your petitioner, The Atchison, Topeka & Santa Fe Railway Company, respectfully show that on the 27th day of January, 1906, an order in the above entitled matter was made by said referee, a copy of which is hereto annexed, together with brief of petitioners, that such order was and is erroneous in this, to-wit:

First. That the said Referee erred in holding that under the evidence the petitioner the said Railroad Company, was not entitled to have delivered to it by the receivers and trustees in bankruptcy of said Mount Carmel Coal Company coal to the amount of $57,304.16, on account of the agreement made before said receivership between the Mount Carmel Coal Company and the said Atchison, Topeka & Santa Fe Railway Company.

Second. That the Referee erred in holding that The Atchison, Topeka & Santa Fe Railway Company did not have an equitable right under the agreement made with it by the said Mount Carmel Coal Company to have an order made by him for the delivery by the Receivers and Trustees to said
29 Railway Company of Coal to the amount of $57,304.16 for moneys in that amount advanced to said Mount Carmel Coal Company by said Railway Company, which said coal was agreed to be furnished to satisfy said advances by the said Mount Carmel Coal Company before its adjudication in bankruptcy.

Third: That the referee erred in holding that there was no testimony indicating an intention to modify the written lease to the extent that the advances made by the Railway Company to the Mount Carmel Coal Company were to be paid by the latter in coal.

Fourth: That the referee erred in holding that said verbal agreement between the Atchison, Topeka & Santa Fe Railway Company and the Mount Carmel Coal Company was a separate and independent agreement from the contract and lease set out in the petition herein.

Fifth. That the referee erred in denying the relief prayed for by the petitioners herein, which was that the said amount of money so advanced by the said Atchison, Topeka & Santa Fe Railway Company be paid to it in full by the delivery of coal by said receivers and trustees, or that the receivers and trustees be ordered and directed to deliver over the possession of all lands and properties described in said written contracts set forth in the petition.

5 1-2. That the referee erred in holding that the written lease under which the receivers and trustees took possession of the coal mines operated by the Mount Carmel Coal Company before the receivership, was not charged with the payment of the amounts advanced by the petitioner to the Mount Carmel Coal Company to satisfy its pay rolls and to
30 keep the mines described in said lease in a running condition.

Sixth. That the said referee erred in denying to the petition the general relief prayed for in its petition.

WM. R. SMITH,
O. J. WOOD,
Attorneys for petitioner,
The Atchison, Topeka & Santa Fe Railway Company.

ROBERT DUNLAP,
Of Counsel.

State of Kansas,
County of Shawnee.—ss.

I, Edward L. Copeland, being duly sworn on oath, state that I am the Secretary and Treasurer of the Atchison, Topeka & Santa Fe Railway Company, a corporation, the petitioner herein, and do make solemn oath that the statements of fact contained in the above and foregoing are true, according to the best of my knowledge, information and belief.

E. L. COPELAND.

Subscribed to and sworn to before me this 5th day of February, 1905.

GEO. W. PORTER,
Notary Public.

Seal N. P. My commission expires January 21, 1907.

In the District of the United States for the District of
31 Kansas First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Opinion of the Referee on petition of The Atchison, Topeka & Santa Fe Railway Company, The Osago Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company.

The petitioners entered into a contract with Charles J. Devlin on or about the first day of October, 1896, whereby they leased to him a certain coal and mineral rights in Osage and Crawford Counties, Kansas, for a term of three years. The lease provides for the payment of certain royalties by Mr. Devlin for coal taken from the leased premises, and also makes provision for the furnishing of certain amounts of coal to The Atchison, Topeka and Santa Fe Railway Company (hereinafter called the Santa Fe Company), one of the lessors, at prices specified in the lease. On the first day of March 1897, this lease, by and with the consent of the petitioners, was duly assigned by Charles J. Devlin to The Mount Carmel Coal Company.

The said lease was modified and its terms extended by subsequent agreements until June 1, 1906. The extension agreements required the Mount Carmel Coal Company to give a bond in the sum of $100,000.00, conditioned for the faithful performance of the terms of the contract.

In the conduct of its business it became necessary for The Mount Carmel Coal Company to borrow money from time to time, with which to meet its pay rolls. At times the credit of The Mount Carmel Coal Company became exhausted and it was unable to borrow money from the banks without first taking up obligations held by them. Upon such occasions
32 the Coal Company, through its President, Charles J. Devlin, would make application to the Santa Fe Company for assistance in the way of procuring funds with which to meet its pay rolls.

The manner in which this was done is well summarized in the testimony of Mr. Wellman, Assistant Treasurer of the Santa Fe Company on re-cross examination. It reads as follows:

"Q. Now to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on instances, had borrowed from banks a certain amount of money, possibly to meet his pay roll, and then when that note became due, and his next pay roll might be maintained, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the notes, and then they let Devlin have the additional money. That is the fact, is it? A. Yes."

The testimony also shows that these advances made by the Santa Fe Company to enable the Mount Carmel Coal Company to meet its pay rolls, were to be paid by the delivery of coal under the terms of the lease above referred to.

Article XXII of the lease covers the sale and delivery of coal to the Santa Fe Company, and reads as follows;

"Article XXII."

"Said C. J. Devlin shall sell and deliver to the Railway Company, on its cars at the mines (except in case of accidents, strikes or causes beyond his control) and the Railway Company shall purchase, in such quantities as are required daily, all the coal required by it in the operation of the lines of railway in Kansas, as far west as and including Newton, which it

may own, control, or operate, and such portion of its
33 supply from Kinsley to Newton, including Kinsley and tributary branches, as it may from time to time elect, Provided, that the supply for Atchison, and Leavenworth, may be bought from other parties than said C. J. Devlin, at the election of the Railway Company, and Provided, Further, that the coal supply herein contracted for may be increased to an amount not over 50,000 tons per year for use on lines other than those described in this article, if owned, leased, controlled or operated by the Railway Company. All coal so taken by the Railway Company shall be upon the following terms and conditions:

"1. That lump coal so furnished shall be screened lump coal, as free from slack, slate and other impurities, as the nature of the coal will permit, by the use of the usual appliances for screening and preparation.

"2. That the Railway Company shall have the right to inspect the coal at the mines and may reject any which is not screened and prepared as above specified.

"3. That the Railway Company shall pay to said C. J. Devlin on or before the 15th day of each month, for all coal so delivered during the preceding calendar month, per ton of 2,000 pounds, track scale weights at the mine, as follows:

(a.) One dollar and forty-nine cents ($1.49) per ton, mine run coal in the Osage District.

(b.) One dollar and fourteen cents ($1.14) per ton screened lump in the Cherokee District.

(c.) Eighty-nine cents ($0.89) per ton mine run coal in the Cherokee District.

(d.) Twenty cents ($0.20) per ton, slack coal, in
34 the Cherokee District.

(e.) One dollar and six cents ($1.06) per ton for lump and nut coal mixed, in the Cherokee District.

"4. That the Railway Company shall have the right at all reasonable times, to examine the track scales and to inspect the books and papers pertaining to the weighing of the coal.

"5. That in the event of accident or strike at the Cherokee & Pittsburg Coal & Mining Co.'s mines, which prevents said C. J. Devlin supplying coal from that mine, or if the Railway Company shall elect to take all or any part of its coal supply from other mines controlled by said C. J. Devlin, then the railway company shall itself pay the trackage or switching charge on such coal.

"6. That if C. J. Devlin is obliged to pay an advance in the prices now paid to miners for mining coal, which are.

Osage City,	yearly,	$1.25	per ton.
Peterton,	"	1.21	"
Scranton,	"	1.03	"
Frontenac,	summer,	0.87-1-2	"
"	winter,	0.95	"

then the price to be paid by the Railway Company shall be increased to the extent of such advance in mining prices, and in the event of a reduction in the mining prices, the price to be paid by the Railway Company shall be reduced to the extent of such reduction in mining price, Provided, that if coal shall be mined at any mine or place other than those above mentioned, then said coal shall, within the meaning of this article, be treated in precisely the same manner as if mined at that mine or place above mentioned, to which it is nearest in location.

"7. That in case the Railway Company shall elect
35 within one year after October 1, 1896, to take its supply of coal for any other portion of its lines during the balance of the term hereof from the mines hereby leased, said C. J. Devlin shall furnish such coal at the same price as hereinbefore provided, upon receiving at least ninety (90) days notice of the approximate quantity of coal required daily."

It is claimed by petitioners that at the time the arrangements were made by the Santa Fe Company to advance money to enable the Mount Carmel Coal Company to meet its pay rolls as aforesaid, that the terms of the written contract between the parties were modified by the oral agreement with respect to advancing money and receiving pay therefor in coal to be furnished by the Coal Company, and that the agreement with respect thereto became a part of the original contract and subject to all of its terms.

Under the terms of the written lease the contract may be declared forfeited by either party for failure to comply with its terms. The forfeiture clauses read as follows:

"Article XVII.

36 "This lease and agreement shall continue for three (3) years from date hereof, but may be terminated by and at the option of the three parties hereto as follows:

"(a) By the Coal Companies, or the Railway Company, for a failure by said C. J. Devlin to perform any of his obligations, covenants or agreements, if within thirty (30) days after written notice of such failure, and the nature of it, he does not cure such failure by performance, satisfactory to said Coal Companies and to the Railway Company.

"(b) By said C. J. Devlin for a failure by either of the other parties to perform its obligations, if within thirty (30) days after written notice of such failure and the nature of it, it does not cure such failure by performance, satisfactory to said C. J. Devlin.

"In the event of a termination by either method aforesaid, such termination shall operate as to all parties hereto and extend to all the provisions hereof, except such as from their nature are to be performed in the event of termination, but such termination, or right to terminate, shall not effect the right to recover damages for any such failure, or in any way relieve either party from his or its covenants and agreements hereunder.

"Article XXI.

"If the said C. J. Devlin shall fail to pay the rental or royalties herein reserved, or any part thereof, on the day when the same become due and payable under the provisions hereof, and shall continue in such default for thirty (30) days, or if default shall be made by him in any of his covenants
37 and agreements herein contained, it shall and may be lawful for said Coal Companies, their attorneys, agents or assigns, at their election, to declare the terms herein provided for ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said C. J. Devlin, or any other person or persons occupying, in, or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as their first and former estate; and to distrain for any rent, royalty or other sum that may be due hereunder, upon any property belonging to the said C. J. Devlin, whether the same be exempt from execution and distress by law or not, and said C. J. Devlin in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this State, or in any other way, meaning and intending hereby to give to the said Coal Companies, their successors and assigns, attorneys or agents, a valid and first lien upon any and all goods, chattels or other property belonging to said C. J. Devlin, which said C. J. Devlin may place upon the demised premises, as security for the payment of said rentals, royalties and other sums in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding, and at the end of the term herein provided, or sooner in case of termination as provided in Article XVII hereof; or, in case said C. J. Devlin shall fail to promptly and properly keep and perform each and every one of his covenants, undertakings and agreements herein provided for, the

said C. J. Devlin covenants and agrees to surrender and deliver up said demised premises and property, peaceably to the said Coal Companies, their successors, attorneys, agents or assigns, immediately upon such termination of said term; and if
38 said C. J. Devlin shall remain in possession of the same after notice of such default, or after the termination of this lease, in any of the ways above named, or as fixed herein, he shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject to all the conditions and provisions hereof, and to eviction and removal, forcible or otherwise, with or without process of law, as above stated."

It is claimed by the petitioners that in as much as the verbal agreement to advance money to meet the pay rolls became engrafted upon the original lease and constituted a modification of it, that the failure to furnish sufficient coal to pay advances made, constitutes a breach of the contract which permits a cancellation of the lease, and that the Trustees in Bankruptcy should be compelled to pay the full amount due on the advances made to the Mount Carmel Coal Company, or that petitioners be permitted to exercise their option on cancelling the contract.

Expressed in the language of the petition, the claim and prayer of petitioners are as follows:

"That by reason of said failure to comply with the provisions of said contract and the delivery of coal, the said The Atchison, Topeka, & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal and Mining Company are entitled to declare said contracts and leases forfeited and void, and are entitled to the possession of the property covered by said leases, unless the receivers appointed in said bankruptcy proceedings are directed and in-
39 structed to deliver to said The Atchison, Topeka & Santa Fe Railway Company coal in an amount sufficient to liquidate the indebtedness created as aforesaid.

"Your petitioners therefore pray that J. E. Hurley, Cyrus Leland and Walter Reeves, Receivers appointed in the above entitled proceeding in bankruptcy, be directed either to deliver to said The Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contracts hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and The Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be

paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal & Mining Company, The Osage Carbon Company and The Atchison, Topeka and Santa Fe Railway Company, in full compliance with the terms and provisions of said contracts."

It is also claimed by petitioners that there are strong equities in their favor, which should be given consideration by the Court, growing out of the fact that the assistance given by them prevented the closing down of the mines and consequent disasters, and that the rights of the creditors were protected and the possibilities of receiving dividends greatly increased thereby.

The advances made by the Santa Fe Company which are before the Court for consideration, are three in number and were made under the following circumstances:

First. On April 15, 1905, the account of the Mount Carmel Coal Company with the Santa Fe Company was overdrawn to the extent of $24,063.16. The Santa Fe Company had paid to the Coal Company that much more than it was entitled to receive on account of coal delivered. In order to settle this account the Coal Company gave to the Santa Fe Company two drafts, with the understanding that if the drafts were not paid they would be charged against the amounts due it for coal for the next month. One draft was for $10,000 and the other for $14,063.16. The $10,000 draft was paid on June 19, 1905. The other draft was entended until July 1, upon the promise of the Coal Company to pay it upon that day. It was not paid upon that date and Mr. Devlin, President of the Coal Company, was informed sometime between July 1st and July 29th that the amount of it would be charged against the proceeds from coal, due the Mount Carmel Coal Company. The charge against its accounts was actually made on July 29th, 1905. The moneys advanced the Mount Carmel Coal Company, which constitute the aforesaid item of $24,063.16, were advanced in the manner heretofore stated, for the purpose of enabling the Mount Carmel Coal Company to meets its pay rolls. Just when they were made is not disclosed by the testimony.

Second. On May 23, 1905, $20,280.00 was advanced the Mount Carmel Coal Company by the Santa Fe Company to enable it to meet its pay rolls. The advance was to be paid by July 1905 coal vouchers. The testimony is uncertain as to whether the money was paid direct to the Coal Company or whether it was to be used to take up a note due the

National Bank of Commerce at Kansas City, and a new note given by the Coal Company to the bank to raise the ne-
41 cessary funds to meet its pay rolls.

A question propounded to Mr. Wellman and his answer thereto, found on page 99 of the transcript of testimony, would indicate that the money was used to take up some obligation. They are as follows:

"Why do you say this $20,280 was money obtained and used by Mr. Devlin on May 23rd? A. Because Mr. Devlin represented to us that if he took up that obligation he could get his money for the pay roll."

Third. The third item, amounting to $33,247.50, was advanced to the Coal Company to take up a note for that amount due the American National Bank of Kansas City. This was done to enable the Coal Company to borrow a similar amount from the bank to meet its pay rolls. The money was paid to the bank and the note taken up on July 3rd, 1905. The note was turned over to the Santa Fe Company by the Bank and it is now in the possession of that Company.

Various credits have been allowed against these advancements, as appears by an exhibit attached to the petition, reducing the amount of petitioner's claim to $57,304.16.

I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be paid by money due the Coal Company for Coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying, that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to
42 mean that the written contract was necessarily modified by the agreement to advance moneys to meet the pay rolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent, with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made, to meet pay rolls.

Although there are equities in favor of petitioner's claim, by reason of having advanced money to meet pay rolls and keep

the Mount Carmel Coal Company a going concern, I can find nothing in the law which will justify the court in giving the claim priority over those of other creditors.

It must be apparent that the advances were for the benefit of the Santa Fe Company as well as the Mount Carmel Coal Company. It was important that it be kept supplied with coal to operate its road, and the shutting down of these mines might have caused embarrassment to the Santa Fe Company. Futhermore, its interest in the mining properties leased to the Mount Carmel Coal Company was protected by keeping the property in operation.

The testimony also shows that the advancements were made in accordance with a practice which had been followed for a considerable time.

An order will be entered denying the relief prayed for by the petitioners.

All objections made by the attorney for the Trustee, where ruling was reserved, are overruled.

Dated Jan. 27, 1906. N. H. LOOMIS, Referee.

43 In the District Court of the United States for the District of Kansas, First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt. In Bankruptcy.

Notice.

To J. E. Hurley, Cyrus Leland and Walter Reeves, Receivers:

You and each of you are hereby notified that on the 20th day of November, A. D. 1905, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, at Chambers at Topeka, Kansas, before Honorable John C. Pollock, Judge of the United States District Court in and for the District of Kansas, The Atchison, Topeka & Santa Fe Railway Company, Cherokee & Pittsburg Coal & Mining Company and the Osage Carbon Company will appear and request permission of said Court to file an intervening petition in said above entitled cause, a copy of which proposed intervening petition is hereto attached, and shall ask for an order in accordance with the prayer thereof, when and where you may appear, etc.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
CHEROKEE & PITTSBURG COAL & MINING CO.
THE OSAGE CARBON COMPANY.

By Wm. R. Smith and O. J. Wood,
Their Attorneys.

Dated at Topeka, Kansas, November 1st, 1905.

Service of a copy of the foregoing notice and within petition accepted this 1st day of November, 1905.

J. E. HURLEY, C. LELAND Jr.,
Receivers.

In the District Court of the United States, for the District of Kansas, First Division.

44 In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Petition of the Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal & Mining Company.

Your petitioners, The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal & Mining Company respectively represent that they are Corporations organized and existing under the laws of the State of Kansas.

Your petitioners further show that on or about the first day of October, 1896, they entered into a contract with one Charles J. Devlin, a copy of which contract is hereto attached and made a part of this petition and marked "Exhibit A."

That afterwards said Contract, by and with the consent of The Osage Carbon Company, Cherokee & Pittsburg Coal & Mining Company and The Atchison, Topeka & Santa Fe Railway Company, was duly assigned to The Mount Carmel Coal Company, a corporation organized and existing under the laws of the State of West Virginia, a copy of which assignment is hereto attached, and made a part of this petition and marked "Exhibit B".

45 Afterwards, on the First day of June, 1898, a contract was made between The Osage Carbon Company, Cherokee & Pittsburg Coal & Mining Company and The Atchison, Topeka & Santa Fe Railway Company, extending and modifying said first named agreement, a copy of which said contract of June 1st, 1898, is hereto attached and made a part of this petition and marked "Exhibit C"

That afterwards, on the thirtieth day of August, 1900, a contract was duly entered into between The Osage Carbon Company Cherokee & Pittsburg Coal & Mining Company and Mount Carmel Coal Company and The Atchison, Topeka & Santa Fe Railway Company, extending said last named contract until

June 1, 1906, a copy of which contract dated August 30, 1900, is hereto attached and made a part of this petition and marked "Exhibit D."

That afterwards said Mount Carmel Coal Company, by its President Charles J. Devlin, duly authorized, represented to The Atchison, Topeka & Santa Fe Railway Company that it was impossible for said Mount Carmel Coal Company to pay off the laborers engaged in mining coal by said Mount Carmel Coal Company upon the lands described in the leases and contracts hereinbefore referred to, unless The Atchison, Topeka & Santa Fe Railway Company would advance to said Mount Carmel Coal Company enough moneys to enable the said Mount Carmel Coal Company to pay the laborers engaged in operating said mines. And it was thereupon agreed between the said Mount Carmel Coal Company and the said The Atchison, Topeka & Santa Fe Railway Company that the contracts and extensions thereof, hereinbefore referred to, should be modified to extent that the said Railway Company should advance the necessary moneys to pay off the laborers and
46 keep said mines in operation and for the money so advanced the said Mount Carmel Coal Company should deliver to the said The Atchison, Topeka & Santa Fe Railway Company, during the months of July, 1905, and August, 1905, a sufficient amount of coal at the prices provided for in the contracts hereinbefore referred to to fully cancel and liquidate the indebtedness thereby created.

Your petitioners further represent that in compliance with this verbal [midification] of the written contracts hereinbefore set out said The Atchison, Topeka & Santa Fe Railway Company furnished to said Mount Carmel Coal Company money to the amount of Sixty Six Thousand Nine Hundred and forty-seven and 7-100 Dollars ($66947.07), as shown by itemized statement of account hereto attached and made a part of this petition and marked "Exhibit E." That there is a credit due upon said amount advanced, in the sum of Nine Thousand, Six hundred and Forty-two and 91-100 Dollars ($9642.91). An itemized account of said credits is hereto attached and made a part of this petition and marked "Exhibit F." That there is a balance due on account of the moneys advanced in accordance with the terms of the verbal contract hereinbefore set forth from said Mount Carmel Coal Company to The Atchison, Topeka & Santa Fe Railway Company, in the sum of Fifty Seven Thousand, Three Hundred and Four and 16-100 Dollars ($57304.16), which amount should have been fully paid and liquidated by the delivery of coal in accordance with the
47 terms of said verbal contract, during the months of July and August, 1905.

That on account of the bankruptcy proceedings in this Court on the seventh day of July, 1905, in the matter of the petition in bankruptcy of Charles J. Devlin, Mount Carmel Coal Company et al, and the receivers appointed in said proceedings by the Court on said day having taken possession of the mines heretofore operated by said Mount Carmel Coal Company, under the provisions of said several contracts hereinbefore set forth, the said Mount Carmel Coal Company failed to carry out its contract with The Atchison, Topeka & Santa Fe Railway Company, Cherokee & Pittsburg Coal and Mining Company, The Osage Carbon Company, as modified by the verbal contract between the said Mount Carmel Coal Company and the said The Atchison, Topeka and Santa Fe Railway Company, as hereinbefore set forth, and said Mount Carmel Coal Company did not nor any one for it deliver to The Atchison, Topeka & Santa Fe Railway Company coal in payment of said amounts advanced.

That by reason of said failure to comply with the provisions of said contract and the delivery of the coal, the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and Cherokee & Pittsburg Coal and Mining Company are entitled to declare said contracts and leases forfeited and void and are entitled to the possession of the property covered by said leases, unless the receivers appointed in said bankruptcy proceedings are directed and instructed to deliver to said The Atchison, Topeka and Santa Fe Railway Company coal in an amount sufficient to liquidate the indebtedness created as aforesaid.

Your petitioners therefore pray that J. E. Hurley,
48 Cyrus Leland and Walter Reeves, receivers appointed in the above entitled proceedings in bankruptcy, be directed either to deliver to said The Atchison, Topeka & Santa Fe Railway Company an amount of coal sufficient to carry out the provisions of the contract hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and the Atchison, Topeka and Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal and Mining Company, The Osage Carbon Com-

pany and The Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contract.

WM. R. SMITH
O. J. WOOD,
Attorneys for Petitioners.

State of Kansas,
Shawnee County—ss.

E. Wilder, being of lawful age and being duly sworn,
49 on oath states, that he is the secretary and treasurer of the above named petitioner, The Atchison, Topeka & Santa Fe Railway Company and held such office during all the time covered by the contracts, leases and extensions mentioned in the above and foregoing petition. That he has read and knows the contents of the above and foregoing petition and that the matters, things and statements therein contained are true.

E. WILDER.

Subscribed in my presence and sworn to before me this first day of November, 1095

GEO. W. PORTER,
Seal N. P. Notary Public.

My commission expires January 21, 1907.

[Copy. Original is typewritten without marginal notes and heading to and including "Lease and Agreement."]

A. T. Secretary's No. **10886.**

Charles J. Devlin { **The Osage Carbon Co.**
Cherokee & Pittsburg Coal & Mining Co.
The Atchison, Topeka & Santa Fe Railway Co.

October 1, 1896. Expires October 1, 1899.

LEASE AND AGREEMENT.

Parties to agreement: Osage Carbon Co., Cherokee & Pittsburg C. & M. Co., C. J. Devlin, The A. T. & S. F. Rly. Co.

This Agreement made the first day of October, A. D. 1896, by and between THE OSAGE CARBON COMPANY and the CHEROKEE & PITTSBURG COAL & MINING COMPANY, (hereinafter called the "Coal Companies,") parties of the first part; CHARLES J. DEVLIN, (hereinafter called "C. J. Devlin,") party of the second part, and THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, (hereinafter called the "Railway Company,") party of the third part.

WITNESSETH THAT:

WHEREAS, Said C. J. Devlin desires to lease the coal lands and properties of the Coal Companies and also desires to furnish said Railway Company with coal for use upon certain of its railways: and

WHEREAS, Said Coal Companies are willing to lease their said lands and properties and said Railway Company is willing to purchase coal from said C. J. Devlin to the extent, at the prices and upon the conditions hereinafter fixed,

NOW, THEREFORE, Said parties do mutually covenant and agree with each other as follows:

ARTICLE 1.

Lease from Osage Carbon Co. Term 3 years.

THE said THE OSAGE CARBON COMPANY, for itself, hereby demises and leases to the said C. J. Devlin, for the term of three years from and after the date hereof, unless sooner terminated as hereinafter provided, the following-described real estate and personal property, situated in the county of Osage, in the state of Kansas, viz.: *All its coal and mineral rights in:*

Coal and mineral rights.

Description of real estate.

Township 14 South, Range 15 East.

Part of section.	*Section.*	*Acres.*
N.W. ¼	26	160
N.E. ¼	34	160
S.E. ¼ lying north of A. T. & S. F. R. R.	34	47.46
S.W. ¼ lying north of A. T. & S. F. R. R.	34	143.29
S.E. ¼	33	160

Township 15 South, Range 15 East.

Part of section.	*Section.*	*Acres.*
N.E. ¼ of N.E. ¼	3	39.42
S. ½ of N.E. ¼	3	80
S.E. ¼	3	160
N.E. ¼	4	150.59
S. ½	4	320

Twp. 15 South, Range 15 East—*Concl.*

Part of section.	*Section.*	*Acres.*
S.E. ¼	5	160
N.E. ¼	7	160
N.E. ¼	8	160
N.W. ¼	17	160
E. ½ of N.E. ¼	30	80
W. ½ of W. ½ of N.E. ¼	30	40

Township 15 South, Range 14 East.

Part of section.	*Section.*	*Acres.*
N.W. ¼, part of	36	3
N.E. ¼	35	160
S.E. ¼	35	153.80
E. ½ of N.W. ¼	35	72
S.W. ¼	35	160

37

Township 10 South, Range 14 East.

Part of section.	*Section.*	*Acres.*
S.W. ¼	1	160
N.E. ¼	2	162.24
S. ½	2	320
E. ½ of N.W. ¼	2	81.10
N.E. ¼	3	161.47
E. ½ of N.W. ¼	3	80.10
S. ½	3	320
N. ½ of N.E. ¼	10	80
N.W. ¼ of	10	160
S. ½	10	320
All of	11	640
N. ½ of N.W. ¼	12	80
S.E. ¼ of N.W. ¼	12	40
S.W. ¼	12	160
E. ½	12	320
All of	13	640
E. ½	14	320
S.W. ¼	14	160
N. ½	15	320
S.W. ¼	15	160
S.E. ¼, except S.E. ¼ of S.E. ¼	15	150
N. ½	22	320
N.E. ¼	23	160
S.E. ¼	23	139.50
N. ½ of N.W. ¼	23	80
W. ½ of S.W. ¼ of N.W. ¼	23	20
E. ½ of S.E. ¼ of N.W. ¼	23	20
W. 5 acres of S. ½ of S.E. ¼ of N.W. ¼	23	5

Township 16 South, Range 14 East.

Part of section.	*Section.*	*Acres.*
S.W. ¼ of N.E. ¼ of S.W. ¼	23	10
N.E. ¼ of N.W. ¼ of S.W. ¼	23	10
S.W. ¼ of N.W. ¼ of S.W. ¼	23	10
N. 55 acres of S. ½ of S.W. ¼	23	55
All of	24	640
All of	25	640
S.E. ¼ of N.E. ¼	26	38
W. ½ of S.E. ¼ S.E. ¼	26	20
N.W. ¼ of S.E. ¼	26	40
W. 10 acres of N.E. ¼ of S.W. ¼	26	10
S.W. part of	26	12
N. 10 acres of N.E. ¼ of N.E. ¼	27	10
W. ½ of N.E. ¼	27	80
S.W. ¼	27	160
S. ½	28	320
All of	33	640
All of	34	640
S. ½ except N.E. ¼ of N.E. ¼ of S.E. ¼	35	310
W. 120 acres of N.W. ¼	36	120

Township 16 South, Range 15 East.

Part of section.	*Section.*	*Acres.*
S. ½	4	320
S. ½ of N.W. ¼	4	80
N.E. ¼ of N.W. ¼	4	36.77
N.W. ¼ of N.W. ¼	4	36.82
S.E. ¼	5	160
S. ½ of N.E. ¼	5	80
N.E. ¼ of N.E. ¼	5	36.76
N.W. ¼ of N.E. ¼	5	37.06
S.E. ¼	6	160
N.W. ¼	7	140.20
S.W. ¼	7	140.60
S.E. ¼	7	160
E. 50 acres of N. ½ of N.E. ¼	7	50
S.W. ¼ of N.E. ¼	7	40
E. ½	8	320
S. ½ of S.W. ¼	8	80
All of	9	640
N. ½	10	320
N.W. ¼ of N.W. ¼, part of,	11	23.62
S.W. ¼ of N.W. ¼, " "	11	24.26
N.W. ¼ of S.W. ¼, " "	11	24.90
S.W. ¼ of S.W. ¼, " "	11	25.54
N.W. ¼ of N.W. ¼, " "	14	26.08
S.W. ¼ of N.W. ¼, " "	14	26.51
N.W. ¼ of S.W. ¼, " "	14	26.95
S.W. ¼ of S.W. ¼, " "	14	27.38
S. ½ of N.E. ¼	15	80
S. ½	15	320
All of	16	640
N. ½ of N.E. ¼	17	80
W. ½	17	320
S.E. ¼	17	160
S.E. ¼	18	160
S.W. ¼	18	137.83
N.W. ¼	19	137.05
N.E. ¼	19	160
N. ½	20	320
N.E. ¼ of S.W. ¼	20	40
N. ½ of S.E. ¼	20	80
E. 60 acres of S. ½ of S.E. ¼	20	60
All of	21	640
All of	22	640
N.W. ¼ of N.W. ¼, part of,	23	28.15
S.W. ¼ of N.W. ¼, " "	23	29.23
N.W. ¼ of S.W. ¼, " "	23	30.33
S.W. ¼ of S.W. ¼, " "	23	31.41

Township 17 South, Range 14 East.

Part of section.	*Section.*	*Acres.*
N.E. ¼	3	161.30
N.W. ¼	3	161.50
S. ½	3	320
N.E. ¼	4	161.50
N.W. ¼	4	161.50
All of	9	640
W. ½	13	320

Twp. 17 South, Range 14 East—*Cont.*

Part of section.	*Section.*	*Acres.*
W. ½ of N.W. ¼	19	78.60
S.W. ¼	19	159
S.E. ¼	19	160
W. ½ of N.W. ¼	25	80
E. ½	26	320
N.W. ¼	26	160
N.W. ¼	30	159.10

Twp. 17 South, Range 14 East—*Concl.*

Part of section.	*Section.*	*Acres.*
S.W. ¼	30	158.90
S.E. ¼	30	160
N.E. ¼	31	160
S. ½ of N.W. ¼	31	79.72
Total acreage being, more or less.		22,812.34

ALSO all the coal and mineral rights in the following-described leased land, in Osage county, state of Kansas:

Township 16 South, Range 14 East.

Part of section.	*Section.*	*Acres.*
S.W. ¼ of S.E. ¼	22	40

Other lands.

AND ALSO, all its coal and mineral rights in any other lands belonging to the Osage Carbon Company, not specifically mentioned herein:

Personal property.

TOGETHER: with the coal mines, railway tracks and all buildings, structures, tenement houses, machinery, engines, boilers, rails, cars, tools, fixtures, implements, appliances, equipment and other property appurtenant to or used in connection with said

Right to mine.

coal mines, and the maintenance and operation thereof, with the full right of mining, extracting, removing and selling the coal in said lands, and also all the rights and privileges thereto incident, or appurtenant, or therewith usually had and enjoyed, including the use of so much of the surface of said lands as may be necessary, or desirable in connection with the operation of said mines, or the opening, equipment and operation of additional mines: and

Lease from Cherokee & Pittsburg C. & M. Co.

Term 3 years.

The said Cherokee & Pittsburg Coal & Mining Company, for itself, hereby demises and leases to the said C. J. Devlin, for the term of three years from and after the date hereof, unless sooner terminated as hereinafter provided, the following-described real estate and personal property, situated in the county of Crawford in the state of Kansas,

Coal and mineral rights.

viz.: *All its coal and mineral rights in:*

Township 29 South, Range 25 East.

Description of real estate.

Part of section.	*Section.*	*Acres.*
S.E. ¼ of S.E. ¼	32	40

Township 30 South, Range 25 East.

Part of section.	*Section.*	*Acres.*
S. ½ of N.W. ¼	3	80
S.W. ¼	3	160
S. ½ of N.E. ¼	4	80
S. ½	4	320
S. ½ of N.W. ¼	4	80
N.E. ¼ of N.W. ¼	4	40
N.W. ¼ of N.W. ¼	4	40
N.E. ¼ of N.E. ¼	5	40
S.E. ¼ of N.E. ¼	5	40
N.E. ¼ of N.W. ¼ (Lots 1, 2, 3, 4 & 5, plat of est'te of J. J. Carlton.)	5	161.12
N.W. ¼ of N.W. ¼		
S. ½ of N.W. ¼		
S. ½	5	320
N. ½	8	320
S.E. ¼	8	160
E. ½ of S.W. ¼	8	80
N.W. ¼ of S.W. ¼, except about 10 acres,	8	30
All of	9	640
N. ½ of N.W. ¼	10	80
N.E. ¼ of N.W. ¼	17	40

Township 30 South, Range 24 East.

Part of section.	*Section.*	*Acres.*
S.E. ¼ of S.W. ¼, part of (W. ½)	25	26.66
S.W. ¼ of S.W. ¼	25	40
S.W. ¼	26	160
S.E. ¼	27	160
S. ½ of N.E. ¼	27	80
N.E ¼	34	160
S. ½ of S.E. ¼	34	80
N.E. ¼ of S.E. ¼	34	40
All of	35	640
S.W. ¼ of	36	160
W. ½ of N.W. ¼	36	80
W. part of E. ½ of N.W. ¼	36	53.33

Township 31 South, Range 24 East.

Part of section.	*Section.*	*Acres.*
N.W. ¼	1	158.39
All of	2	636.10
N.E. ¼ E. ½ of N.W. ¼ E. ½ of S.E. ¼	3	316.40
Total acreage, more or less,		3,542

Other lands.

ALSO its coal and mineral rights in any other lands belonging to the Cherokee & Pittsburg Coal & Mining Company, not specifically mentioned herein:

Surface land.

Also, one hundred and sixty acres of surface land, in Crawford county, Kansas, described as follows: The S. W. ¼ of Section 5, Township 30 South, Range 25 East.

41

Personal property.

together with the coal mines, railway tracks and all buildings, structures, tenement houses, machinery, engines, boilers, rails, cars, tools, fixtures, implements, appliances, equipment and other property appurtenant to or used in connection with said coal mines and the maintenance and operation thereof, including one hay barn at Chicopee,

Right to mine.

with the full right of mining, extracting, removing and selling the coal in said lands and also the rights and privileges thereto incident, or appurtenant, or therewith usually had or enjoyed, including the use of so much of the surface of said lands as may be necessary or desirable in connection with the operation of said mines, or the opening,

Excepting right-of-way to Rly. Co.

equipment and operation of additional mines; PROVIDED, that there shall be excepted from this agreement the present right of way and tracks belonging to the Railway Company and there is hereby reserved to each of said Coal Companies respectively the right

Farming and grazing rights reserved.

to lease for farming or grazing purposes any of the surface of the lands hereby demised not required in connection with said mines and to collect and retain the revenues and rentals therefrom, if thereby no unreasonable interference is caused said C. J. Devlin in the operation of the coal mines hereby demised, and PROVIDED, FURTHER, that

Not to undermine right-of-way.

no coal shall be mined from under the right of way or tracks which may now or hereafter belong to or be controlled or operated by the Railway Company, without its written consent.

ARTICLE II.

Peaceful possession guaranteed.

EACH of said Coal Companies, for itself, respectively covenants and agrees that it will secure said C. J. Devlin, during the term hereof, in the quiet and peaceful possession of the property hereby demised.

ARTICLE III.

C. J. D. to purchase supplies, etc.

SAID C. J. Devlin shall purchase from said Coal Compaies all of the mules, harness, mine supplies and stocks of material at the respective mines of said Coal Com-

Excepting equipment.

panies at the date hereof, but surplus machinery, tools and mine equipment shall not be considered as "mine supplies."

Inventory.

An inventory of all the articles to be purchased by said C. J. Devlin as aforesaid shall be taken by an agent of his appointment and an agent appointed by the Coal Companies, who shall together fix the value of all mules, harness, mine supplies and stocks of material, which the said C. J. Devlin is to buy, and, in case of their disagreement, then the sum to be paid by C. J. Devlin shall be arbitrated as hereinafter provided.

ARTICLE IV

Monthly statements of coal mined.

SAID C. J. Devlin shall furnish to the Treasurer of each of said Coal Companies, on or before the tenth day of each month, a full and correct statement of the amount of coal mined from the lands of each company during the preceding calendar month, and said Coal Companies and the said Railway Company shall, at all reasonable times,

Right to inspect books.

have access to and the right to inspect all books of account and papers of the said C. J. Devlin pertaining to the operation of any of the mines hereby leased, or the conduct of his business in connection therewith.

Annual statements.

Said C. J. Devlin shall also, on the first day of October, 1897, and at the end of each year thereafter, during the term of this lease, furnish each of the Coal Companies with a sworn statement of the receipts and disbursements from operating the properties of such company hereby leased during the preceding year, and said Coal Companies

Right to verify.

shall have the right to inspect and examine any books and papers of the said C. J. Devlin pertaining to such business in order to verify the figures so submitted.

ARTICLE V.

Royalty.

SAID C. J. Devlin shall pay during the full term of this agreement, as royalty on each ton of two thousand pounds of "lump" or "run of mine" coal mined from the leased premises, the sum of nine (9) cents.

Nut, pea or slack coal.

No royalty shall be paid on nut, pea or slack coal mined from any of the lands hereby demised.

Minimum royalty.

The minimum royalty to be paid under this agreement shall be $2,750 per month, regardless of whether any coal is mined from the premises hereby demised, said minimum to be divided between the Coal Companies as they may agree, PROVIDED, that in

Provision for exhaustion of coal, etc.

the event of the exhaustion of the workable coal available to the mines now open on the premises demised, its deterioration in quality, or in the event of labor strikes, or interruptions of railway transportation, rendering it impracticable to mine in any one year two hundred thousand (200,000) tons of coal, subject to the royalties hereby affixed,

Reduction of minimum.

then the minimum royalty herein provided shall be equitably and correspondingly reduced, and, in case of a disagreement by the parties hereto as to what would be an equitable reduction in such case, or cases, then the question shall be decided by arbitration as hereinafter provided, but no claim for any reduction of the minimum royalty

Notice of claim for reduction.

shall be valid unless said C. J. Devlin shall, immediately upon the happening of the event entitling him to such claim, give notice thereof in writing to the coal companies,

Excess of royalty may be deducted when coal is mined.

and PROVIDED, FURTHER, that in case royalty is paid in excess of coal actually mined in any month, such excess may be deducted from royalties accruing at any time thereafter on coal actually mined during the year then current, in excess of the minimum above specified, but no such excess accruing in any one year shall be taken into consideration in connection with the business of any other year.

ARTICLE VI

Defining.

THE terms "lump" and "run of mine" coal as used in the foregoing article are understood to mean as follows, viz.:

Lump coal.

(*a*) LUMP COAL: All coal that will pass over screens having a space of seven-eighths inches between the bars, or an equivalent wire-mesh screen, shall be classified as "lump coal." In case screens having wider or narrower spaces are used, the amount of lump coal shall be estimated from the results of the actual tests.

Run of mine coal.

(*b*) RUN OF MINE COAL: When coal is not screened but is loaded in cars and sold as it comes from the mine, it shall be classified as "run of mine coal."

ARTICLE VII

Rental

SAID C. J. Devlin shall, as rental for the demised premises, in addition to the royalties hereinbefore reserved, make the following monthly payments during the term hereof, viz.:

C. & P. C. & M. Co.

(*a*) To the Cherokee & Pittsburg Coal & Mining Company $150 per month.

Osage C. Co.

(*b*) To the Osage Carbon Company $100 per month.

ARTICLE VIII.

C. J. D. to pay damages for injury to persons or property.

SAID C. J. Devlin shall indemnify and save harmless the said Coal Companies and the said Railway Company against all claims or demands that shall be made against them, for or on account of injuries to persons or to property, or death, resulting from mining operations under this lease upon any of the lands hereby demised or the business incidental thereto and he shall also pay and satisfy each and every judgment that shall be rendered against either of the parties hereto in any action instituted to recover damages to persons or property, or for death, when occasioned by mining operations under this lease, or business incidental thereto, upon any of the lands hereby demised,

Except those resulting from switching cars by Rly. Co.

PROVIDED, that said C. J. Devlin, in the absence of his negligence or the negligence of his employes, shall not be liable for injuries to persons or property or death resulting from the switching of cars by the Railway Company.

ARTICLE IX.

Bond $100,000.

SAID Devlin shall give a good and sufficient bond in the penal sum of one hundred thousand dollars ($100,000) for the full and faithful performance of his covenants and agreements herein contained, which bond shall be signed by three sureties, each of whom shall be satisfactory to the president and treasurer of the Railway Company.

ARTICLE X.

C. J. D. to insure.

SAID C. J. Devlin shall keep all the buildings, tenements, structures, and machinery, located upon the premises hereby demised, insured against loss by fire in such

Policies payable to Coal Co.

companies and amounts as may be agreed upon, and each policy shall be made payable to the Coal Company owning the property so insured.

ARTICLE XI.

C. J. D. to conduct operations and business in workmanlike manner.

SAID C. J. Devlin shall conduct all the mining operations and business incidental thereto, in a careful, proper and workmanlike manner and shall do all things that may be necessary, in order that the future operations of the mines, after the term hereof, may be safe and practicable and in no way impaired, save as expressly permitted herein, and it is agreed that the proper conduct of such operations shall, in addition to other things, require said C. J. Devlin to properly timber and support, where necessary, the roof in all rooms and entries worked, as far as practicable.

ARTICLE XII.

Right and obligation to inspect mines by owners.

SAID Coal Companies, and each of them, shall, at all reasonable times, have the right to inspect, and they shall, by an agent in connection with an agent of said C. J. Devlin, inspect during March in each year the workings of their respective mines, and ascertain if the operations are being conducted as herein contemplated. In case such agents shall find and report in writing that the operations are not so carried on, or will unnecessarily endanger the future operations of the mine, or mines, specifying the defects or failures, then and in that event said C. J. Devlin shall, without unreasonable delay, conform to the suggestions of said report.

IF, however, such agents shall disagree on any matter as the result of such inspection, the same shall be immediately submitted to arbitration and speedily determined as hereinafter provided, but it is expressly understood and agreed that the provisions of this Article are intended as an additional security to the Coal Companies for the protection of their property, and that nothing herein contained shall relieve said C. J. Devlin from his liability under any covenant contained in any other of the articles hereof.

ARTICLE XIII.

Right to remove equipment.

SAID C. J. Devlin shall have the right to remove from any of the aforesaid mines to another thereof any tools or equipments which he may deem advisable, but he shall give written notice to the Coal Companies, specifying in detail the articles so removed.

ARTICLE XIV.

Taxes to be paid by owners.

EACH of said Coal Companies shall pay, before they become delinquent, all lawful taxes or assessments levied against any of its property hereby leased. In the event that either of said Coal Companies shall fail to pay, when due, all lawful taxes or assessments or the principal or interest upon indebtedness secured by mortgage on its property, then said C. J. Devlin may pay said tax, assessment, principal or interest, and deduct the amount, or amounts, so paid from the first royalties or rentals thereafter accruing hereunder, with legal interest, and continue to make such deductions until the same shall equal the amount, or amounts, so paid for taxes, assessments, principal or interest.

C. J. D. may pay taxes and other liens and deduct from royalty.

ARTICLE XV.

Leases.

SAID Coal Companies shall, so far as they may legally do so, assign to said C. J. Devlin their interest in any leases which they may have for real or personal property, mining rights, mining machines or other patent rights, in any way connected with, appurtenant to or which could be used to advantage in connection with the lands, mines, stores or other property hereby leased, and said C. J. Devlin shall, on the termination hereof, reassign to said Coal Companies all such leases and patent rights in this article referred to as may be then in force, and said C. J. Devlin shall assume and pay, during the term hereof, all rentals, charges or other sums which may become due or payable according to the terms of any lease or agreement falling within the provisions of this article, from the date hereof until the expiration of the term herein provided and thereafter until such time as he may, by agreements proper in form, reconvey to the Coal Companies all interest which may have been assigned to him under the provisions of this article. Said C. J. Devlin shall not be required to pay any rentals, royalties or other sums which may have become due under said leases or agreements prior to the date hereof.

47

ARTICLE XVI.

Payments.

THAT C. J. Devlin shall, on or before the 20th day of each month, make the payments required of him herein for all royalties, rentals or other sums accruing during the preceding calendar month, such payments to be made to the respective treasurers of the Coal Companies at Topeka.

ARTICLE XVII.

Term 3 years.

THIS lease and agreement shall continue for three (3) years from the date hereof,

Agreement may be terminated:

but may be terminated by and at the option of either of the three parties hereto as follows:

By Coal Cos or Rly. Co.

(*a*) By the Coal Companies, or the Railway Company, for a failure by said C. J. Devlin to perform any of his obligations, covenants or agreements, if within thirty (30) days after written notice of such failure, and the nature of it, he does not cure such failure by performance, satisfactory to said Coal Companies and to the Railway Company.

By C. J. D.

(*b*) By said C. J. Devlin for a failure by either of the other parties to perform its obligations, if within thirty (30) days after written notice of such failure and the nature of it, it does not cure such failure by performance, satisfactory to said C. J. Devlin.

In the event of a termination by either method aforesaid, such termination shall operate as to all parties hereto and extend to all the provisions hereof, except such as from their nature are to be performed in the event of termination, but such termination, or right to terminate, shall not affect the right to recover damages for any such failure, or in any way relieve either party from his or its covenants and agreements hereunder.

ARTICLE XVIII.

Coal Cos. to purchase supplies at end of agreement.

THAT upon the termination of this lease and agreement, either by the expiration thereof or in the manner provided in the preceding article, the Coal Companies shall purchase from said C. J. Devlin, as follows:

Mules, etc.

1. The mules, harness and mine supplies then in use at the mines on their respective lands.

Mdse. at stores.

2. The stocks of merchandise then in the respective stores, acquired by said C. J. Devlin hereunder.

Coal-yard equipment.

3. The office buildings, furniture and equipment at any retail coal yards acquired by said C. J. Devlin hereunder.

Stocks of coal.

4. The stocks of coal then in such yards.

Mine equipment.

5. The mine rails, pit cars and tools in and at the respective mines, which may have been furnished by said C. J. Devlin, in excess of similar articles at such mines on October 1, 1896.

Buildings, etc.

6. Such buildings, equipment and improvements as may have been placed on their respective lands by said C. J. Devlin, at his own expense, with the written consent of the coal company owning such lands.

The amount to be paid C. J. Devlin by said coal companies for such articles shall be ascertained in the following manner:

Inventory to be taken.

An inventory of the articles shall be taken by an agent of said C. J. Devlin and an agent of the Coal Companies, and the value of all such articles as fixed by such agents shall be the sum to be paid by the Coal Companies; unless said agents shall disagree, in which event the amount to be paid shall be determined by arbitration, as hereinafter provided; PROVIDED, FURTHER, that the Coal Companies shall not be required to purchase of said C. J. Devlin, under the provisions hereof, articles different in character from those which said C. J. Devlin is required to purchase at this time from the Coal Companies, the purpose of this article being to provide that, at the expiration of the term herein fixed, said Coal Companies shall purchase from said C. J. Devlin all articles of the character which, by the terms hereof, he is now required to purchase from the Coal Companies.

ARTICLE XIX.

Care of equipment, etc.

SAID C. J. Devlin shall, at the expiration of the time fixed in this lease and agreement mentioned, or sooner, if terminated as provided in Article XVII hereof, yield up said demised premises, including all buildings, tools, machinery and equipment, to the Coal Companies, in as good order as they now are, loss by fire, mining operations, in-

evitable accident and ordinary wear and tear excepted, but the term "mining operations" as used in this article, shall only include such as may be conducted in a careful, prudent and workmanlike manner.

ARTICLE XX.

Coal Cos.' right to purchase improvements.

THAT upon the termination hereof the Coal Companies shall have the option, for a period of thirty (30) days, to purchase and pay for all the machinery, equipment, trade fixtures, appliances and improvements on the leased premises which have been furnished at the expense of said C. J. Devlin, (and not provided for in Article XVIII hereof), at an appraised value to be agreed on, or determined by arbitration, and, in case said Coal Companies shall not desire to purchase said articles, they may give said C. J. Devlin written notice to that effect and said C. J. Devlin shall have the right for ninety (90) days after the receipt of said notice; or, in case no notice is given, he shall have the right to remove all such property from said premises, doing so, however, in a manner which will not interfere with the mining operations of the property hereby demised.

C. J. D.'s right to remove improvements.

ARTICLE XXI.

Failure to pay rental or royalty.

If said C. J. Devlin shall fail to pay the rental or royalties herein reserved, or any part thereof, on the day when the same become due and payable under the provisions hereof, and shall continue in such default for thirty (30) days, or if default shall be made by him in any of his covenants and agreements herein contained, it shall and may be lawful for said Coal Companies, their attorneys, agents or assigns, at their election, to declare the term herein provided for ended, and into the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said C. J. Devlin, or any other person or persons occupying, in, or upon the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as their first and former estate; and to distrain for any rent, royalty or other sum that may be due hereunder, upon any property belonging to the said C. J. Devlin, whether the same be exempt from execution and distress by law or not, and said C. J. Devlin in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this state, or in any other way, meaning and intending hereby to give to the said Coal Companies, their successors and assigns, attorneys or agents, a valid and first lien upon any and all the goods, chattels or other property belonging to said C. J. Devlin, which said C. J. Devlin may place upon the demised premises, as security for the payment of said rentals, royalties and other sums in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding, and at the end of the term herein provided, or sooner in case of termination as provided in Article XVII hereof; or, in case said C. J. Devlin shall fail to promptly and properly keep and perform each and every one of his covenants, undertakings and agreements herein provided for, the said C. J. Devlin covenants and agrees to surrender and deliver up said demised premises and property, peaceably to the said Coal Companies, their successors, attorneys, agents or assigns, immediately upon such termination of said term; and if said C. J. Devlin shall remain in possession of the same after notice of such default, or after the termination of this lease, in any of the ways above named, or as fixed herein, he shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject to all the conditions and provisions hereof, and to eviction and removal, forcible or otherwise, with or without process of law, as above stated.

Distrain for rent, etc.

Waiver.

ARTICLE XXII.

C. J. D. to sell coal to Rly. Co. in Kansas.

SAID C. J. Devlin shall sell and deliver to the Railway Company, on its cars at the mines (except in case of accidents, strikes or causes beyond his control) and the Railway Company shall purchase, in such quantities as are required daily, all the coal required by it in the operation of the lines of railway in Kansas, as far west as and including Newton, which it may own, control or operate, and such portion of its supply from Kinsley to Newton, including Kinsley and tributary branches, as it may from time to time elect, PROVIDED, that the supply for Atchison, and Leavenworth, may be bought from other parties than said C. J. Devlin, at the election of the Railway Company, and PROVIDED, FURTHER, that the coal supply herein contracted for

Atchison and Leavenworth supply may be bought from other parties.

may be increased to an amount of not over 50,000 tons per year for use on lines other than those described in this article, if owned, leased, controlled or operated by the Railway Company. All coal so taken by the Railway Company shall be upon the following terms and conditions:

Quality. 1. That lump coal so furnished shall be screened lump coal, as free from slack, slate and other impurities, as the nature of the coal will permit, by the use of the usual appliances for screening and preparation.

Inspection. 2. That the Railway Company shall have the right to inspect the coal at the mines and may reject any which is not screened and prepared as above specified.

Price. 3. That the Railway Company shall pay to said C. J. Devlin on or before the 15th day of each month, for all coal so delivered during the preceding calendar month, per ton of 2,000 pounds, track scale weights at the mine, as follows:

Osage mine run. (*a*) One dollar and forty-nine cents ($1.49) per ton, mine run coal in the Osage District.

Cherokee; screened lump. (*b*) One dollar and fourteen cents ($1.14) per ton screened lump in the Cherokee District.

Mine run. (*c*) Eighty-nine cents ($.89) per ton mine run coal in the Cherokee District.

Slack. (*d*) Twenty cents ($.20) per ton, slack coal, in the Cherokee District.

Lump and nut mixed. (*e*) One dollar and six cents ($1.06) per ton for lump and nut coal mixed, in the Cherokee District.

Right of Rly. to inspect scales. 4. That the Railway Company shall have the right at all reasonable times, to examine the track scales and to inspect the books and papers pertaining to the weighing of the coal.

When Rly. Co. shall pay trackage or switching charges. 5. That in the event of accident or strike at the Cherokee & Pittsburg Coal & Mining Co.'s mines, which prevents said C. J. Devlin supplying coal from that mine, or if the Railway Company shall elect to take all or any part of its coal supply from other mines controlled by said C. J. Devlin, then the Railway Company shall itself pay the trackage or switching charge on such coal.

Change of price to Rly. when mining price is advanced or reduced. 6. That if C. J. Devlin is obliged to pay an advance in the prices now paid to miners for mining coal, which are

Osage City,	yearly,	$1.25 per ton.
Peterton,	"	1.21 "
Scranton,	"	1.03 "
Frontenac,	summer,	.87½ "
"	winter,	.95 "

then the price to be paid by the Railway Company shall be increased to the extent of such advance in mining prices, and in the event of a reduction in the mining prices, the price to be paid by the Railway Company shall be reduced to the extent of such reduction in mining price, PROVIDED, that if coal shall be mined at any mine or place other than those above mentioned, then said coal shall, within the meaning of this article, be treated in precisely the same manner as if mined at that mine or place above mentioned, to which it is nearest in location.

C. J. D. shall furnish coal to other portions of line. 7. That in case the railway company shall elect within one year after October 1, 1896, to take its supply of coal for any other portion of its lines during the balance of the term hereof from the mines hereby leased, said C. J. Devlin shall furnish such coal at the same price as hereinbefore provided, upon receiving at least ninety (90) days notice of the approximate quantity of coal required daily

ARTICLE XXIII.

C. J. D. to ship coal over Rly. lines. As far as practicable, all shipments of commercial coal from the property hereby leased, to competitive railway points, shall be made over the Railway Company's lines, unless other lines make freight rates which the Railway Company is not willing to meet, in which case the shipments may go over the line making such rate while it exists, and said C. J. Devlin shall in good faith and without evasion, use his best endeavors to sell coal from said leased mines in territory which can be reached over the Railway Company's lines, and to increase the coal traffic on said lines, and shall assume all rates and contracts made by the Coal Companies for the sale of coal that may be in effect October 1st, 1896.

C. J. D. to assume Coal Cos.' contracts for coal.

C. J. D. to ship mdse. over Rly. lines.

He shall, as far as practicable, ship all merchandise for his stores, operated at or near the mines on the demised premises, over the lines of the Railway Company, during such time as the Railway Company shall make as low rates of freight thereon as can be obtained over any competing line.

ARTICLE XXIV.

C. J. D. to assume all Coal Cos.' agreements.

During the term hereof said C. J. Devlin shall assume and fully and faithfully carry out and perform all agreements now in existence and to which said Coal Companies, or either of them, may be a party.

ARTICLE XXV.

Rly. Co. to construct spurs, etc.

Said Railway Company shall construct, at its own expense, and without unreasonable delay, the necessary spur or branch lines to any mines hereafter opened and operated by said C. J. Devlin on the lands hereby leased and the necessary side tracks to said mines, and make any extensions of side tracks which may be necessary at the mines now opened on said lands, and keep all of the aforesaid tracks in repair, free of expense to said C. J. Devlin.

ARTICLE XXVI.

Agents' agreements.

That wherever it is provided herein that agents of the respective parties shall act in conjunction, the agreement of such agents shall be deemed the agreement of their principals.

ARTICLE XXVII.

Arbitration.

Any matter which, according to the provisions hereof may be arbitrated, shall be determined in the following manner

The complaining party shall notify, in writing, the one alleged to be in default, specifying the defaults and the things required to be done, and the name, residence and occupation of the person selected by it as arbitrator, and within ten (10) days after the receipt of such notice, the responding party shall notify, in writing, the complaining party of the name, residence and occupation of the person selected by it as arbitrator, and the two so selected shall proceed to choose a third like disinterested person, and they three shall, as speedily as the case will allow, proceed to determine the matter in dispute. In case the respondent shall fail, to select a person and notify the complainant within the time as aforesaid, then the person selected by the complainant shall at once select one other disinterested person and they two shall select a third disinterested person and they three shall constitute the arbitrators. In case said two arbitrators selected by the parties in interest respectively shall fail to agree upon a man, then said third arbitrator shall be appointed by the Judge for the time being of the District Court of the United States for the state of Kansas. The decision, in writing, signed by any two arbitrators, appointed and selected as aforesaid, shall be final, conclusive and binding on all concerned.

ARTICLE XXVIII.

C. J. D. not to assign without consent of other parties to this agreement.

Neither this lease and agreement, nor any interest therein, shall be assigned by the said C. J. Devlin without the consent of the Coal Companies and of the Railway Company, given in writing by their respective Presidents.

In Witness Whereof, The parties of the first part have caused these presents to be executed by their respective Presidents, duly attested by their respective Secretaries; the party of the second part has hereunto set his hand and seal and the party of the third part has caused these presents to be executed by its President, duly attested by its Secretary, the day and year first above written.

THE OSAGE CARBON COMPANY,

[seal.] By

Attest: ALDACE F. WALKER, *President.*

E. WILDER, *Secretary.*,

CHEROKEE & PITTSBURG COAL & MINING COMPANY,

By

[SEAL.]

ALDACE F. WALKER, *President.*

Attest:

E. WILDER, *Secretary.*

CHARLES J. DEVLIN. [SEAL.]

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,

By

[SEAL.]

E. P. RIPLEY, *President.*

Attest:

E. WILDER, *Secretary.*

Approved as to form:

VICTOR MORAWETZ,

Gen. Counsel.

Exhibit "B."

61 In consideration of the payment of one dollar ($1.00) receipt of which is hereby acknowledged, and of other valuable considerations, I, Chas. J. Devlin, the Lessee named in the attached lease from The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, bearing Secretary's No. 10886 and dated October 1st, 1896, do hereby assign and transfer the said attached lease, and all my rights, title and interest thereunder to the Mount Carmel Coal Company, a corporation organized under the laws of the State of West Virginia; this assignment being made subject to the approval of The Osage Carbon Company; the Cherokee & Pittsburg Coal & Mining Company and The Atchison, Topeka, & Santa Fe Railway Company, parties to said lease.

Dated this first day of March, 1897.

(Sgd) CHAS. J. DEVLIN.

State of Kansas,
County of Shawnee.—ss.

Before me, a Notary Public, in and for the County and State aforesaid, this day, personally came Chas. J. Devlin, who is personally known to me to be the same person who executed the above instrument and he duly acknowledged the execution of the same.

In testimony whereof, I have hereunto set my hand and official seal this Fifth day of May, A. D. 1897.

(Sgd) FRANCIS C. DOWNEY.
Seal of Notary Public Notary Public.
My Commission expires Jan. 6, 1899.

62 Exhibit "C."

This Agreement, made this first day of June, 1898, between the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, hereinafter called the Coal Companies, parties of the first part, Mount Carmel Coal Company, party of the second part, and The Atchison, Topeka & Santa Fe Railway Company, hereinafter called the Railway Company, party of the third part. Witnesseth That:

Whereas, heretofore, upon the first day of October, 1896, a certain agreement was entered into between the said Coal Companies, as parties of the first part, Charles J. Devlin, as party of the second part, and the Railway Company, as party of the third part, for the leasing and working, for the term of three years from the date of said agreement, of the coal properties of the said Coal Companies situated in the Counties of Osage

and Crawford in the State of Kansas, and the supplying of said Railway Company with coal, as well as for other things in said agreement mentioned; and

Whereas, afterwards, on or about the first day of March, 1897, the said Charles J. Devlin duly assigned and transferred all of his right and interest in and under said lease and agreement to said Mount Carmel Coal Company, which said last named Coal Company, on or about April 10th, 1897, duly accepted said assignment and assumed said lease and agreement and undertook to perform all the covenants of the said Charles
63 J. Devlin, therein, which said assignment to and substitution to said Mount Carmel Coal Company in the place and stead of said said C. J. Devlin, was assented to by the other parties to said agreement; and

Whereas it is the desire of the parties hereto that the said lease of said Coal Companies and the terms and provisions of said agreement dated said first day of October, 1896, be extended for the term and period of five years from the date hereof upon the same terms, provisions and covenants as in said agreement of October 1st, 1896, contained and set forth, except as in this agreement changed and modified;

Now, Therefore, in consideration of the premises and of the covenants of each party hereto, it is mutually covenanted and agreed by and between the parties hereto as follows:

The said lease of the coal properties and said agreement dated October 1st, 1896, shall be extended and continued in force and operation in favor of said Mount Carmel Coal Company and of the other parties hereto for the term and period of five years from the date of this agreement, upon and subject, however, to all the terms, covenants and provisions in said agreement of October 1st, 1896, contained, except as specifically modified by the provisions hereinafter specially set forth; and except as herein modified all of the covenants of the Coal Companies, binding upon them respectively in the said agreement of October 1st, 1896, shall be binding upon them respectively and be applicable to this extension of said lease and agreement; and all the covenants in said lease and agreement of October 1st, 1896, binding upon said Charles J. Devlin and assumed by said Mount Carmel Coal Company
64 as hereinbefore stated, shall be binding upon the said Mount Carmel Coal Company and be applicable to this extension of said lease and agreement; and all the covenants binding upon said Railway Company in said agreement of October 1st, 1896, shall be binding upon it and applicable also to this extension of said lease and agreement during the same; and, generally, except as herein modified, the terms and provisions of said agreement of October 1st, 1896, shall be bind-

ing upon the respective parties hereto as in said agreement for a period of five years from the date hereof, unless sooner terminated in the manner provided for in said lease and agreement of October 1st, 1906, and with the same force and effect as if the said Mount Carmel Coal Company were substituted in the name, place and stead of said C. J. Devlin therein and as if the term therein provided, instead of running for the period of three years from the first day of October 1906, should be designated and determined as running for the period of five years from the first day of June, 1898.

The party of the second part covenants and agrees to and with the Cherokee & Pittsburg Coal & Mining Company that, as expeditiously as practicable, and at its own sole cost and expense, it will sink and open up in a good and workmanlike manner a new mine upon the southwest quarter (1-4) of section five (5), Township twenty-nine (29) South, Range twenty-five (25) in Crawford County, being a part of the premises demised by said Cherokee & Pittsburg Coal & Mining Company and shall work and operate the same under and subjectto the terms and provisions applicable to similar mines.

65 It is further covenanted and agreed that the rental payable by said Mount Carmel Coal Company to said Cherokee & Pittsburg Coal & Mining Company during the term of this agreement shall be increased from the sum of One Hundred and Fifty Dollars ($150.) per month to the sum of Two Hundred Dollars ($200.) per month, shall be payable during the term of this lease and agreement by the said Mount Carmel Coal Company to the said Cherokee & Pittsburg Coal & Mining Company.

All balances which may be or become due from the Coal Companies to said Mount Carmel Coal Company for construction work on mines heretofore opened and worked under said agreement of October 1st, 1896, shall be extended and shall not become payable until the expiration of this agreement.

At the expiration or termination of this agreement, all of the machinery and fixed appliances which may be used at the time in or about any of the mines opened after the date hereof and worked by said second party upon the property of the Coal Companies leased to it shall forthwith belong to and become, without cost or charge therefor, the property of the Coal Company respectively upon whose lands said machinery or fixed appliances may at the time be used, it being understood, however, that mules, harness, pit cars, hand tools and supplies in the mine storehouse are not to be considered fixed equipment of appliances, but shall remain the property of the Mount Carmel Coal Company.

In case the party of the second part should open up or operate new mines upon property other than that leased by the Coal Companies, as hereinbefore referred to, then preference shall at all times be given for the purpose of supplying commercial business to coal from the mines upon the properties of the Coal Companies so leased, it being understood that mines upon the properties of the Coal Companies so leased shall be worked to their full capacity and coal therefrom shall be first used for the purpose of supplying the commercial business and the Railway Company. No coal for the supply of the Railway Company shall be taken or furnished from such new mines located upon other lands than those leased by the Coal Companies, without the consent of the Railway Company. Should coal be taken or furnished from such new mines upon other property than that leased by the Coal Companies, without the consent of the Railway Company, then, at the option of the Coal Companies, said Mount Carmel Coal Company shall account for the same to the Coal Companies and pay the same royalties thereon as though such coal had been taken from lands leased by the Coal Companies.

66

The party of the second part shall, upon the execution of this agreement, give a good and sufficient bond in the penal sum of One Hundred Thousand Dollars ($100,000.) for the full and faithful performance of its covenants and agreements, which bond shall be signed by at least three sureties, each of whom shall be satisfactory to the President and Treasurer of the Railway Company.

Said party of the second part shall, during the term of this lease and agreement, in addition to the rental and royalties payable, also pay annually as further rental to the Coal Companies a further sum of money, which sum is to be determined upon the thirty-first day of May of each year, during the term of this agreement, beginning with the thirty-first day of May, 1898, and ascertained as follows: From the gross receipts derived by the said party of the second part from the sale of all coal and the working or operation of the mines upon the lands leased by the Coal Companies during the year preceding said thirty-first day of May, there shall be deducted the expenses and disbursements of said party of the second part during such year in carrying on the operation of and in working said mines upon the lands so leased by the Coal Companies, but such expenses shall not include any salaries of any officers of the party of the second part, except those now paid and which consist of salaries of the Secretary and bookkeepers, and a list of which salaries shall be furnished to the Auditor of the Coal Companies within thirty days from

67

the date of this agreement, and except also salaries of officials actually engaged at the mines. Neither shall such expenses include the cost or expense of construction or opening up of new mines or extensions thereof. From the balance so ascertained, there shall be deducted the sum of Twenty-Five Thousand Dollars ($25,000.) and one-half of the balance then remaining shall be determined as the sum payable as a further annual rental for the year preceding, and the same shall be payable within thirty days after the thirty-first day of May in each year, but this provision shall not be construed as creating a partnership between the Coal Companies and the said Mount Carmel Coal Company, nor as giving authority to direct the mode and manner in which the business of said Mount Carmel Coal Company shall be conducted, nor as giving said Mount Carmel Coal Company authority to act for or bind the said Coal Companies; but said Coal Companies shall, never-
68 theless, have and retain all the rights, powers and privileges granted to or reserved by them and set forth in said agreement of October 1st, 1896.

Said Mount Carmel Coal Company, its successors or assigns, shall not do or suffer anything to be done which may make the said Coal Companies liable for its acts, debts or obligations; and said Mount Carmel Coal Company, its successors and assigns, shall indemnify and save harmless the said Coal Companies and each of them, their and each of their successors and assigns, and the said Railway Company, its successors and assigns, against any and all liability which may be imposed upon them or any of them, by reason of anything done or suffered or neglected to be performed by said Mount Carmel Coal Company, its successors or assigns, and against any loss, damage, cost or expense which they, said Coal Companies and said Railway Company, or any of them, or the successors or assigns of any of them, may suffer or be put to by reason of or arising out of the acts or omissions of said Mount Carmel Coal Company, its successors or assigns, or the debts or obligations created by the said Mount Carmel Coal Company, its successors or assigns.

It is further agreed and understood that the said lease and agreement dated the first day of October, 1896, shall, from the date hereof, be held and deemed to be extended and modified by this agreement, as hereinbefore provided.

This agreement shall be binding upon the successors and assigns of the party of the second part, and shall be binding upon and run to and insure in favor of the successors and assigns of the first and third parties respectively.

In witness whereof, the parties hereto have caused these presents to be executed in duplicate by their respective
69 Presidents, duly attested by their respective Secretaries and their respective corporate seals to be attached, the day and year first above written.

THE OSAGE CARBON COMPANY.
[Seal] By E. P. Ripley
Its President.

Attest: E. Wilder, Secretary.

CHEROKEE & PITTSBURG COAL & MINING CO.
[Seal] By E. P. Ripley,
Its President.

Attest: E. Wilder, Secretary.

MOUNT CARMEL COAL COMPANY,
[Seal] By Chas. J. Devlin
Its President.

Attest: J. D. Norton, Secretary.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.
[Seal] By E. P. Ripley,
Its President.

Attest: E. Wilder, Secretary.

70 Exhibit "D."

Agreement, made August 30, 1900, between the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, hereinafter called the "Coal Companies," parties of the first part, the Mount Carmel Coal Company, hereinafter called the "Mount Carmel Company," party of the second part, and the Atchison, Topeka & Santa Fe Railway Company, hereinafter called the "Railway Company," party of the third part.

Whereas, on or about the first day of October, 1896, a certain agreement dated that day was entered into between the Coal Companies, as parties of the first part, Charles J. Devlin, as party of the second part, and the Railway Company as party of the third part, and thereafter, on or about the first day of March, 1897, the said Charles J. Devlin, with the assent of the other parties to said agreement, duly assigned all his right and interest therein to the Mount Carmel Coal Company, and thereafter, on or about the first day of June, 1898, the Coal Companies and the Railway Company entered into a supplemental agreement with the Mount Carmel Company dated that day, extending the time within which said agreement should be and continue in force and effect to June first, 1903, and

Whereas, it is the desire of the parties hereto that said agreement of October first, 1896, and said supplemental agreement of June first, 1898, shall continue in force and effect for a further period of three (3) years from and after the first day of June, 1903, upon the terms, provisions and conditions in said agreement and said supplemental agreement and hereinafter set forth:

71 Now, Therefore, this Indenture Witnesseth: That the parties hereto have mutually covenanted and agreed to and with each other as follows:

First: Said agreement dated October 1, 1896, and said supplemental agreement dated June 1, 1898, shall be, and the same hereby are, extended and continued in full force and effect for a further period of (3) years from and after the first day of June, 1903, and, except as herein provided, all of the covenants of the Coal Companies binding upon them respectively in said agreement of October first, 1896, and said supplemental agreement of June first, 1898, shall be binding upon them respectively and be applicable to this extension of said agreement and said supplemental agreement; and all of the covenants in said agreement of October first, 1896, and in said supplemental agreement of June first, 1898, binding upon said Charles J. Devlin or upon said Mount Carmel Company, shall be binding upon said Mount Carmel Company and be applicable to this extension of said agreement and said supplemental agreement, and generally, except as herein modified, the terms and provisions of said agreement and said supplemental agreement shall be binding upon the respective parties hereto for such extended period, unless sooner terminated in the manner provided for in said agreement of October first, 1896.

Second: The Mount Carmel Company shall, forthwith upon the execution of these presents, and at its own sole cost and expense, sink and open up, in a good and workmanlike manner, a new mine upon the property of the Cherokee & Pittsburg Coal and Mining Company upon such point in Section two (2), Township thirty-one (31 south, Range twenty-four (24) east, Crawford County, Kansas, as in its opinion is
72 most convenient for the practical and economical working of the coal remaining in the surrounding lands of the said Cherokee & Pittsburg Coal and Mining Company, and shall work and operate the same under and subject to the terms and provisions of said agreements and said supplemental agreement, as modified by these presents, applicable to similar mines on the lands of the Cherokee & Pittsburg Coal and Mining Company.

Third: It being the intention of the parties to continue the said contract relations now existing between them until all the coal in the lands of the Cherokee & Pittsburg Coal and Mining Company, situated in the County of Crawford, in the State of Kansas, which are subject to said agreement of October first, 1896, and said supplemental agreement of June first, 1898, and hereto, has been mined, it is expressly understood and agreed that in case, in the opinion of the Coal Companies, all such coal has not been mined on or prior to June first, 1906, the date of the expiration of said agreement and said supplemental agreement as hereby extended, then and in that case, the Coal Companies shall have the right to further extend the period during which said agreement and said supplemental agreement and these presents shall be in force and effect, for a period sufficiently long, in the judgment of the Coal Companies, to insure the complete mining and working out of such coal; provided, however, that in case the Mount Carmel Company shall desire it, the question as to whether at any time all the coal in said lands has been completely mined shall be submitted to arbitration, as provided for in said agreement of October first, 1896.

Fourth: In case at any time, in the judgment of the Cherokee & Pittsburg Coal and Mining Company, the proper and economical operation of the Coal properties leased by the Cherokee and Pittsburg Coal and Mining Company to the Mount Carmel Company requires the sinking of any ad-
73 ditional mine or mines on said lands, such mine or mines shall forthwith, upon request of the Coal Companies to the Mount Carmel Company, be sunk and opened up by the Mount Carmel Company at the sole cost and expense of the Mount Carmel Company, and the same shall be worked and operated by the Mount Carmel Company in all respects as provided for the sinking and operating of the mine described in paragraph Second hereof; provided, that in case the Mount Carmel Company shall so desire, the question as to whether the proper and economical operation of said properties requires the opening of any such additional mine or mines shall be submitted to arbitration, as provided for in said agreement of October first, 1896.

Fifth: At the expiration or termination of this agreement, the Mount Carmel Company shall and will, in case the Cherokee and Pittsburg Coal and Mining Company desires to sell the same, purchase from the Cherokee & Pittsburg Coal and Mining Company, at an appraised value, all such improvements, equipment, machinery, tools, appliances, tenements, mules, harness, pit cars, supplies, and all other personal property used in or appurtenant to mining operations which the

said Cherokee & Pittsburg Coal and Mining Company may own in any of the mines, or upon any of the lands leased by it to the Mount Carmel Company.

All improvements, equipment, machinery, tools, appliances and tenements pertaining to and used in connection with the construction and operation of the mine described in paragraph Second hereof, or any additional mine or mines constructed or operated under paragraph Fourth hereof, shall be furnished at the sole cost and expense of the Mount Carmel Company and shall be and remain the property of the Mount Carmel Company at the expiration of this contract on the first day
74 of June, 1906, or at the expiration of any extension hereof; provided, however, that said Mount Carmel Company shall not be permitted to remove any such improvements, equipment, machinery, tools, appliances or tenements from said mine or mines, unless and until it shall have been determined by agreement or by arbitration as in paragraph Third hereof provided, that all the coal in said mine or mines has been worked out; and provided further, that in case this contract shall be terminated for or on account of the default of said Mount Carmel Company prior to the time when all said coal shall be mined as aforesaid, then and in that case, all such improvements, equipment, machinery, tools, appliances and tenements shall be and become absolutely the property of that coal company upon whose land the same may be at the time of such termination.

Sixth: Upon the termination of this agreement, the Mount Carmel Company shall, within ninety (90) days after written notice shall be given to it by the Coal Companies, remove from the lands of the Coal Companies all machinery, tools, appliances and other personal property and equipment whatsoever owned by it at such time on said lands; and in case the same shall not be removed within such period of ninety (90) days, the same shall thereafter become and be the property of the Coal Companies absolutely.

Seventh: The time of payment of all balances which may be or become due from the Coal Companies to said Mount Carmel Company for construction work on mines heretofore opened and worked under said agreement of October 1, 1896, shall be extended and the said balances shall not become payable until the expiration or termination of this agreement.

Eight: It is expressly understood and agreed that
75 nothing in this agreement or in said agreements of October first, 1896, and June first, 1898, or either of them, contained shall be construed as giving the Mount Carmel Company any right to mine any coal from any lands, the title to which or any interest in which may be acquired by the

Coal Companies or the Railway Company or either of them subsequent to August 30, 1900.

Ninth: The Mount Carmel Company shall, upon the execution of this agreement, give a good and sufficient bond in the sum of one hundred thousand dollars ($100,000) for the full and faithful performance of its covenants and agreements under said agreement of October first, 1896, and said supplemental agreement of June first, 1898, and these presents, which bond shall be signed by at least three sureties, each of whom shall be satisfactory to the President and Treasurer of the Railway Company, and upon the execution and delivery of said bond, the Coal Companies and the Railway Company shall cancel, surrender and deliver to the Mount Carmel Company any bond heretofore executed by it or by said Charles J. Devlin in that behalf.

Tenth: This agreement shall be binding upon the successors and assigns of the Mount Carmel Company, and shall be binding upon and run to and insure in favor of the successors and assigns of the Coal Companies and the Railway Company, respectively.

In witness whereof, the parties hereto have caused these presents to be executed in duplicate by their respective officers thereunto duly authorized, the day and year first above written.

THE OSAGE CARBON COMPANY.

(Seal.) By E. P. Ripley,
Its President.

Attest: C. L. Deming,
Asst. Secretary.

CHEROKEE & PITTSBURG COAL
76 AND MINING COMPANY,

(Seal.) By E. P. Ripley,
Its President.

Attest: C. L. Deming,
Asst. Secretary.

MOUNT CARMEL COAL COMPANY,

(Seal.) By Charles J. Devlin,
Its President.

Attest: J. G. NORTON,
Its Secretary.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,

(Seal.) By E. P. Ripley,
Its President.

Attest: C. L. Deming,
Asst. Secretary.

77

Exhibit "E."

Partial Report of Account with Receivers Hurley, Leland & Reeves,

Including only items of Mount Carmel Coal Co., prior to receivership.

Debits.

July 29.	The Mount Carmel Coal Co. in settlement of balance against them for the month of April which was due May the 15th 1905, gave two drafts on the Kansas City Coal & Coke Co., dated June 1st, 1905. The first, $10,000; 18 days due June 19th was paid. The second, $14,063.16, 23 days, due June 24th and carrying the interest on both drafts was, upon verbal guarantee that payment would be made on July 1st, extended to that date, at which time draft was protested		$14,063.16
	On May 23rd, 1905, advance with interest was made on account of July voucher, which advance was made to aid in meeting pay-rolls; the pay-days being the second and fourth Saturdays of each month, the Second pay-day of May would fall on May 27th,	$20,280.00	
	On July 3rd, 1905, advance with interest, was made on account of July voucher, which advance was to assist in meeting pay-rolls due June 24th. This payment was promised by E. Wilder, Treasurer, prior to the collapse of C. J. Devlin's affairs, and was to enable him to arrange funds at the American National Bank, of Kansas City, for pay-roll purposes. Anticipating the payment of a note dated May 15th, for $33,000.00, falling due Aug. 15th which payment was promised and made July 3rd,	33,247.50	
		53,527.50	

	Cr. Voucher 69-13 coal July 1st to 7th	$17,934.79		
	Refund of double credit on Bill No. 10875	15.50		
		$17,950.29		
	Less debit balance on June 1905 account	17,301.80	648.49	
	Amount transferred to receiver's account as Mount Carmel Coal Co. balance July 7th,			52,879.01
Aug. 7.	Bill No. 471-0 against Mount Carmel Coal Co. to cover duplicate payment of coal in car No.-72658, 2600 lbs. at $1.75, Sept.			
78	19th, 1904, and Nov. 9th, 1904			4.90
				$66,947.07

Credits.

Aug. 3.	To cancel a part of debit July 18, 1905 of $14,063.16, being amount of fee charged by bank in an endeavor to collect draft of C. J. Devlin, June 1st, 1905, on Kansas City Coal & Coke Co. of $14,060.66	$ 2.50	
4.	Ticket redemption draft No.-51751, favor of Mount Carmel Coal Co.	62.50	
9.	Voucher No. 1975-13, Invoices March, May, June, July 1st to 6th inc.	1,426.60	
11	Ticket redemption draft No.-46516 issued to C. J. Devlin Dec. 14th, just found among C. J. Devlin papers,	2.00	
17	Voucher No. 2443-13, Invoice June to July 7th,	568.48	
17	Voucher 3305-13, Invoice July 3rd	194.13	
19	Pecos Valley & Northeastern Voucher No. 172-16, Invoice June 20th,	14.32	

19	Voucher No. 3311-13, Invoice June	3,294.49
25	Account of express charges included in June 30th, 1905, settlement with Mount Carmel Coal Co., and again collected on certified statement from that Company July 10th, 1905, resulting in over collection	4.45
Sept. 16	Voucher No. 2876-13, Invoice Feb. to July 7th	4,000.33
16	Voucher No. 3388-13, Invoice Feb. June, July 7th,	44.12
27	Pecos Valley & Northeastern vouchers, Invoice April & June,	28.99
		$ 9,642.91
	Balance still due as far as known, Sept. 27	57,304,16
		$66,947.07

79 In the District Court of the United States
for the District of Kansas,
First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Stipulation

It is hereby agreed that the intervening petition of the Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, a copy of which was served on the receivers herein on the first day of November, 1905, may be filed in the above entitled court on November 20, 1905, and will be treated by the receivers of said bankrupt in all respects as if leave of the Court had been obtained for the filing thereof, the said receivers to have up to and until December 10th, 1905, to answer or plead to said petition.

CLIFFORD HISTED,
Attorneys for Receivers.

WM. R. SMITH,
O. J. WOOD,
Attorneys for Petitioner.

In the District Court of the United States
80 for the District of Kansas
First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Compay, et al.,

Demurrer of Receivers.

Now come James E. Hurley, Cyrus Leland, Jr. and Walter Reeves, Receivers, and demur to the petition of the Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and The Cherokee and Pittsburg Coal & Mining Company, filed herein, for the reason that the said petition does not show any grounds for relief in favor of the said Petitioners or either for them, of the nature and kind in said petition demanded.

CLIFFORD HISTED.
Attorneys for Receivers.

In the District Court of the United States
81 for the District of Kansas
First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka and Santa Fe Railroad Company et al.,

Answer of Trustees.

Now come James E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees, and for answer to the petition of the Atchison, Topeka and Santa Fe Railroad Company, the Osage Carbon Company and the Cherokee and Pittsburg Coal & Mining Company deny each and every, all and singular the allegations and averments in said petition contained.

CLIFFORD HISTED,
Attorney for the Trustees.

In the District Court of the United States
82 for the District of Kansas
First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka and Santa Fe Railroad Company et al.,

Amended Answer of Trustees.

Now come James E. Hurley, Cyrus Leland Jr., and Walter Reeves, Trustees, and for answer to the petition of the Atchison, Topeka and Santa Fe Railroad Company, the Osage Carbon Company and the Cherokee and Pittsburg Coal & Mining Company deny each and every, all and singular the allegations and averments in said petition contained.

And these Trustees further answering deny that the said pretended verbal contract set forth in said petition was a modification of the leases in writing, copies whereof are attached to said petition; but, on the contrary, aver that the said verbal contract, if made at all, was an entirely independent contract.

And further aver that said pretended verbal contract as a modification of the said written contracts would be within the statute of frauds of the State of Kansas and void.

CLIFFORD HISTED,
Attorneys for Trustees.

Before N. H. Loomis, Referee.

84 In the matter of the Mount Carmel Coal Company.

Transcript of testimony taken in the matter of the Mount Carmel Coal Company, before N. H. Loomis, Referee, January, 13, 1906.

Appearances: W. R. Smith, Attorney for the A. T. & S. F. Ry. Co. Clifford Histed, Attorney for Mt. Carmel Coal Company.

Judge Smith: It is agreed that inasmuch as this petition was filed when the Receivers were in possession of the properties mentioned in the petition, the amendment may be filed asking the same relief against the Trustees, they having succeeded themselves, but are now denominated Trustees, and we will file that amendment.

As I understand Mr. Histed, you admit these are copies of the original contracts marked exhibits "A" to "F" are true copies of the original contracts and extensions?

Mr. Histed: Yes.

A. O. Wellman, a witness called on behalf of The Atchison, Topeka, and Santa Fe Railway company, being duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Smith:

Q. What is your name, Mr. Wellman? A. A. O. Wellman.

Q. What position do you occupy with The Atchison, Topeka and Santa Fe Railway Company?

A. At the present time Assistant Treasurer.

Q. Well in May, June and July of last year?

85 A. I was book-keeper in charge of accounts.

Q. At the time you were book-keeper in charge of accounts who was the Treasurer of the Company in charge of the Treasury Department here? A. Edward Wilder.

Q. He is now dead is he? A. He is.

Q. Now, did you have charge of accounts between The Mount Carmel Coal Company and the Atchison, Topeka and Santa Fe Railway Company in April and May, 1905? A. I did.

Q. And in June? A. I did.

Q. And in July? A. I did.

Q. Did you meet Mr. Devlin frequently about that time? A. Very frequently.

Q. I wish you would look at this exhibit here marked "Exhibit E" attached to the petition. (Hands witness a paper) There is an itemized bill there against the Mount Carmel Coal Company of fifty odd thousand dollars, advances made. You may state for what purpose those advances were made; first to whom they were made and for what purpose.

A. They were made to C. J. Devlin, for the purpose of meeting his pay rolls.

Q. Payrolls where? A. Mount Carmel Mines.

Q. Do you know how much, at that time, his payrolls were a month?

A. I presume they varied, but the estimated amounts were at $80,000.00. He paid twice a month, Mount Carmel, I believe on the second and fourth Saturdays of the month, about forty odd thousand each pay roll.

Q. Each two weeks?

A. $80,000.00 all together, that is approximately.

Q. During the time mentioned in that bill were these Mount Carmel mines in active operation? A. They were.

Q. Do you know how many employes they had down there?

A. I have no means of knowing.

Q. What position did Mr. Devlin hold in the Mount

86 Carmel Coal Comdany during these times?

A. I understood him to be manager and owner.

Q. President? A. President I think was the title.

Q. Now you may state just how these transactions arose, and what the conversation was between you or Mr. Wilder in the presence of Mr. Devlin.

Mr. Histed: It is admitted that Mr. Devlin is dead?

Mr. Smith: Yes, I will have to, I can't dispute that.

Mr. Histed: We object to any testimony by Mr. Wellman, representing The Atchison, Topeka and Santa Fe Railway Company, with Mr. Devlin representing the Mount Carmel Coal Company, because under the Statute Mr. Wellman is an incompetent witness to testify in such conversation.

Mr. Loomis: I will reserve my ruling. The testimony may go into the record.

Mr. Histed: I would like to have the witness fix the time and the transaction.

Mr. Smith: This is a general statement, and you can take them up as they come along.

Q. State what was said from time to time by Mr. Devlin at the time these advances were made, with respect to their use in satisfying the laborers at the Mount Carmel Mines.
A. What was said to me, or in my presence?
Q. In your presence.

Mr. Histed: It is understood that this testimony is objected to, Mr. Wellman being an incompetent witness.

Mr. Loomis: Yes.

87 A. It was the custom of Mr. Devlin to ask advances.

Mr. Histed: We object to what the custom of Mr. Devlin was.

Mr. Smith: Never mind about the custom. State what was said at the different times. A. He asked for advances for pay roll purposes.
Q. Well were those advances made from time to time by Mr. Wilder as Treasurer, in response to his request?
A. They were in response to his request.
Q. How did he agree to satisfy those advances? A. With voucher for coal.
Q. What do you mean by vouchers for coal? A. His voucher represents the amount of coal furnished the Company from month to month.
Q. In other words he was to furnish coal? A. He was to furnish coal to satisfy them.
Q. How soon was he to furnish that coal after these amounts were advanced?

Counsel for the Mt. Carmel Coal Co. objected to the question as being indefinite and calling for conclusion.

Q. How soon after advances were made did he say he would furnish the coal? What did he say to Mr. Wilder at the time, he would furnish the coal.

A. He was to furnish coal until the advances were satisfied.

Mr. Histed: We object to the answer as being statement of the conclusion of the witness. The referee sustained the objection.

Q. State, what was said about when he would satisfy these advances, by delivery of coal?

Mr. Histed: I insist the witness should be limited by time and place. Objection overruled.

88 Q. Look at that bill. There is an item of fourteen thousand dollars advanced, the first item; when was that advance? Approximate it if you can't give the exact date.

A. I can't give the exact date because this fourteen thousand dollars represents coal that Mr. Devlin didn't furnish in his voucher, which was due May 15.

Q. Due to you May 15? A. Due to us May 15? He was to furnish it at some subsequent date to that.

Q. That was after that fourteen thousand dollars advance?

A. That was after that fourteen thousand dollars was advanced.

Q. What is the next item below that? A. Next item is $20,280.00.

Q. When was that money advanced to him?

A. May 23, 1905; advance with interest was made on account of July voucher, which advance was made to aid in meeting payrolls, the pay days being the second and fourth Saturdays each month; the second pay day of May would fall on May 27th. This advance was made May 23.

Q. Was the advance made after the arrangement with Devlin that he would furnish coal?

Mr. Histed: We object to the question as calling for a conclusion. Objection sustained.

Q. Do you remember the transaction of that advance?

A. I do.

Q. State at whose solicitation it was made, if anybody's, and if anything was said about it.

Mr. Histed: We object to the question; which objection was overruled by the Referee.

A. At request of C. J. Devlin.

Q. Take the next item. A. On July 3, the next item is $33,247.50, on July 3, advance with interest was made on account of July voucher, which advance was to assist in meeting

payrolls due July 24. This payment was promised by
89 E. Wilder, Treasurer, prior to the collapse of C. J. Devlin's affairs, and was to arrange with the American National Bank at Kansas City for payroll purposes.

Q. I wish you would explain that transaction.

A. Mr. Devlin arranged for his pay roll purposes through the American National Bank at Kansas City, and in doing so gave an obligation and he gave an order against his coal voucher, which order was brought to us and filed.

Q. Gave an order on the American National Bank, Kansas City? A. Gave an order on the American National Bank, Kansas City.

Q. For how much? A. 33,000.00, the 247.50 being interest, because we anticipated that — before this was due, it didn't fall due until August 15, Mr. Devlin represented to us that it was absolutely necessary to meet his pay rolls, otherwise there would be serious trouble, and we agreed to take up this note in order that he might arrange with the bank for his funds; that is to say, we paid him money for pay roll purposes, and we so agreed with the bank; that is, Mr. Wilder agreed to do it.

Q. Is that the last item there? A. That is the last item there, yes sir.

Q. What does that aggregate, those advances made? A. It aggregates $66,947.07.

Q. You have credited the Mount Carmel Coal Company with the amounts there? A. Yes sir.

Q. How do these credits come? A. From his vouchers for coal. There are one or two discrepancies here on account of bills that were overcharged, or something of that nature.

Q. This is substantially correct. A. Yes sir, this is correct.

Q. The debit. A. The debit is correct, yes sir. I thought you were talking about the credit.

90 Q. The amount stated for advances made is substantially correct? A. Yes sir.

Q. Who did Mr. Devlin apply to when he wanted these advances made, what officer of the Atchison, Topeka and Santa Fe Railway Company?

A. He applied to the Treasurer, Mr. Wilder. In his absence he applied to me.

Q. Mr. Wilder was present, was he not, during some of the months covered by those advancements. A. He was.

Q. During what period of that time? A. About June 2, I think Mr. Wilder returned.

Q. During the year 1905 he was absent up to June 2?

A. About June 2.

Q. Then after that he was in the office was he? A. Mr. Wilder was in the office most of the time, and at his home.

Q. After that when Mr. Devlin came to the office to make negotiations for advances, were those negotiations made in your presence, with Mr. Wilder? (No answer.)

Q. Say during the time mentioned, during the year 1905, was the Mount Carmel Coal Company furnishing coal monthly to The Atchison Topeka & Santa Fe Railway Company under these contracts stated in this petition? A. They were, yes sir.

Q. What was the practice of the Treasurer's office in the matter of paying the Mount Carmel Coal Company for coal; how was it paid?

Mr. Histed: We object to the question as being incompetent.

Objection overruled.

Q. You have mentioned vouchers here. Explain how they were made. A. The invoices for coal were sent to the Purchasing Agent for the current month.

Q. That is the Mount Carmel Coal Company would
91 send them to the Purchasing Agent? A. The Mount Carmel Coal Company would send them to the Purchasing Agent for voucher.

Q. These invoices show how much coal was delivered to The Atchison, Topeka and Santa Fe Railway Company. A. For the current month. The purchasing Agent would voucher covering invoices in his hands. By agreement the settlement was on the 15th day of the succeeding month. If there was any balance due Mr. Devlin we paid him. If there was any balance due us we charged it up against his next month's voucher for coal.

Q. Now you have received a good deal of coal since—There ain't any dispute about the Receivers and Trustees, receivers first and trustees later, having furnished The Atchison, Topeka & Santa Fe Railway Company with coal sufficient to put in a claim, if it should be charged we had one?

Mr. Histed: We say the Receivers are constantly selling the Santa Fe coal and have been ever since they were qualified.

Mr. Smith: In large amounts?

Mr. Histed: Oh yes. It is not admitted that we furnished it under the contract set up in this petition.

Mr. Smith: Of course not. You will agree the receivers furnished the Santa Fe Railroad with coal to the amount of fifty, sixty, or seventy-five thousand dollars a month?

Mr. Histed: I guess it is that much—more than that.

Cross-Examination.

Questions by Mr. Histed:

Q. Mr. Devlin was connected with several other operating coal companies was he not, Mr. Wellman? A. He was.

Q. He was President of a number of others was he
92 not. A. He was.

Q. Those companies were also selling coal to the Santa Fe Railway Company during this same time? A. They were.

Q. Now, do you fix in your mind, any particular transaction that was brought vividly before your recollection, or are you talking with reference to what your general understanding of some general custom may have been? A. I can fix any certain item you choose.

Q. In your testimony with reference to these conversations you have had with Mr. Devlin—in your testimony to Judge Smith did you have in your mind any particular time in which you said you had any conversation with Mr. Devlin? A. I understood the question was general, and the conversation general.

Q. You were testifying in general? A. When he asked me for any specific item I would testify to that one item.

Q. As a matter of fact it was not a novel thing for the Santa Fe Railway to loan Mr. Devlin money, which he was supposed to subsequently pay by furnishing coal? A. We only furnished him money for pay roll purposes.

Q. That was the practice indulged in by your office for considerable length of time? A. Almost every time Devlin started in his mines we furnished him money for pay roll purposes.

Q. At times you furnished larger sums of money than the amount set up in this exhibit, did you not? A. We have.

Q. Did you uniformly get interest on those loans you made Mr. Devlin? A. When we advanced in advance of settlement day, which I stated was the 15th of the succeeding month, we got interest.

Q. Was that a uniform practice also? A. Yes.

Q. There was nothing in connection with the particu-
93 lar items that were set forth as your charge in Exhibit "E" that differed from the general practice in the course of business you had been following with Mr. Devlin, practically ever since he had been in the coal business? A. Well now, I don't exactly grasp your question.

Q. Whatever money you put up or loaned to Mr. Devlin on these three different occasions you mention in Exhibit "E" was along the same general plan you had previously advanced

him money on many occasions before that? A. These specific items here came to my mind forcibly, as I have stated, for this purpose.

Q. As I say, you had repeated that experience many times in the past with him? A. Yes.

Q. This is simply a continuation of a practice that had obtained between your company and Mr. Devlin's company many times before that? A. For pay roll purposes, yes.

Q. You didn't, of course, see Mr. Devlin disburse any pay-roll? A. I did not.

Q. So far as you know yourself, you don't know whether he spent a dollar of this money for his pay roll, do you? A. I know we made it out at pay roll times, and they were made for that purpose.

Q. So far as your own knowledge goes you do not know whether any of it was actually spent for pay rolls? A. No so far as my own knowledge goes, no.

Q. Do you know whether or not, as a matter of fact, Mr. Devlin may have used portions of this money in his pay rolls of other mines, this specific money? A. I know that at the time we made advances the pay rolls were due for this specific mine.

94 Q. You, of course, argue from that it must have been used here? A. Yes.

Q. But for all you know yourself this may have been used for any of his other mines? A. I didn't pay the miners, so I couldn't say.

Q. Now I want to call your specific attention to those three debits. Have you the account there before you. A. I have.

Q. Q. On what basis do you make the statement that your company advanced this money, or loaned this money to the Mount Carmel Coal Company to meet any pay rolls. A. This first item?

Q. Yes sir. A. This first item of $14,063.16 represents coal that Mr. —— represents advance on coal which Mr. Devlin should have paid, or furnished to us, on May 15, but failed to do so.

Q. Now, that is not the question I asked, Mr. Wellman. You stated, as I understood you, that each one of these items was to meet pay roll? A. Pay roll purposes. This had been advanced for pay roll purposes.

Q. I want to know where you see anything in that statement that indicates that that fourteen thousand dollars was loaned to meet any pay roll. A. The balance over and above the amount of his voucher or previous advance would have been for pay rolls, in the account.

Q. Do you know when the account originated that finally lead in this balance? A. Yes, it originated in April.

Q. What time in April? A. As it is an accumulated balance I could not give you the date.

Q. Would it be the latter part of the first part, in your judgment? A. It is the excess of amount over the coal furnished, therefore I can't tell you.

Q. Then it must have originated clear back in
95 March, if it was an excess?

A. It is an excess in April balance.

Q. Then it necessarily follows that the advancement you made was in March?

A. Not necessarily, it may have been the month of April.

Q. Can you say whether it was March or April?

A. My judgment is it was in April, because this is the balance of April.

Q. How much was the balance?

A. $24,063.16 at the time it was paid.

Q. Was that March pay roll, or April pay roll?

A. That was April—it is April pay roll.

Q. All on earth it is, is when you came to cast your account and strike your balance with Mr. Devlin on April 15, it happened—on May 15, it happened his account was overdrawn with you for $24,063.16? A. Yes sir.

Q. That is all that amounts to? A. Yes.

Q. As to what made up that balance you have no means of knowing at this time.

A. Yes, because it was made up from advances he had paid. We only gave advances for pay roll purposes.

Q. You had to buy coal of him right along—he was selling coal to you right straight along, and his coal bills amounted to more than his aggregated payroll did, didn't it? A. No sir.

Q. You mean to say he was just barely getting enough out of his Mount Carmel Coal Mine to meet his payroll?

A. I mean to say that during the month of April there was a balance of $24,000.

Q. For all the coal now that he had sold you, you had paid him and had overpaid him about $24,000.00?

A. No sir, he owed us.

Q. Certainly, you had overpaid him, he was owing coal he had not delivered you, $24,000.00? A. Yes sir.

Q. Then he settled that balance with you, didn't he,
96 by giving you two drafts?

A. Under protest. He offered us these two drafts, which were time drafts. We took them under protest.

Q. However that might be, you cleared that account, balanced his account by taking two drafts from Mr. Devlin?

A. Not at all. The understanding was if these drafts were not paid they would be charged against his coal voucher for the next month.

Q. As a matter of fact then, one of these drafts was paid on the 18th day of June?

A. It was paid June 19th, $10,000.00.

Q. And the other draft was paid?

A. The other draft was never paid.

Q. Now, have you included the interest in that draft?

A. We have; the draft that was not paid carried the interest for the two drafts.

Q. At what rate? A. Six per cent.

Q. Do you recall any conversation at all that you had with Mr. Devlin at any time with reference to the particular transaction relating to this $14,063.16? A. I do.

Q. When?

A. This draft for $23,000.00 was due in June 24; Mr. Devlin came in and asked for this draft, for the time for this draft to be extended at our bank, and we told them to extend the time, on his verbal agreement that it would be taken up on July 1st.

Q. That is, he said he would pay the draft if you would give him until the first?

A. He said the draft would be paid with the understanding if it was not is would be charged to his account.

Q. You had had one of your drafts paid on June 16, and he promised to pay you the other draft on July 1st.

A. Promised the other draft should be paid July 1st.

Q. And you agreed to that?

A. We agreed to carry it that way.

Q. Do you recall any other conversation that you had with Mr. Devlin with reference to this particular subject now, or have you testified to the sum and substance of your recollection.

97 A. It was agreed that we should charge this up to the account.

Q. Do you recall any other specific conversation you had with Mr. Devlin? You can answer that by "yes" or "no".

A. Yes.

Q. When?

A. The non-payment of this particular item; this particular item not being paid as agreed, we told him it would be charged to his account.

Q. On what date was this? A. After July 1.

Q. When? A. After July first.

Q. When did you have this conversation?

A. You mean the date?

Q. Yes.

A. I can't give you the particular date, except it was after July 1st when we knew it was not paid.

Q. How long after?

A. It was some time between July 1st and July 29th, some date between that, because that is the date we charged it up to his account.

Q. Now, Mr. Wellman, let me direct your attention to that second item. When did you ever have your first conversation with Mr. Devlin with relation to it? A. May 23, 1905.

Q. Now, do you mean to say that on that date you gave Mr. Devlin any money at all?

A. I can't say positively, but I think we paid him by check on that date.

Q. Let me refresh your recollection. Isn't it a fact that Mr. Devlin got that amount of money from the National Bank of Commerce, on his note?

A. That is not my recollection.

Q. Havn't you, subsequently when you came to pay it, taken up that note, and havn't you got the note of either Mr. Devlin or the Mount Carmel Coal Company in your possession now, that represents the identical payment of $20,280.00?

A. I can't say whether we took up the note or paid by check.

Q. Isn't it a fact that whatever paynent you did make was a payment to the National Bank of Commerce, the one you took up being of Mr. Devlin and the Mount Carmel Coal Company?

A. That I can't say, whether we paid check or took
98 up the note.

Q. You won't undertake to say, in the light of my suggestion, that you ever turned over to Mr. Devlin, any of that $20,000.00.

A. I won't say we did, no.

Q. For all you know the transaction took form in the National Bank of Commerce making Mr. Devlin a loan for that amount of money, you subsequently paying the loan and taking up the note. Won't you answer that? Did you know the form of the transaction was a loan made by the National Bank of Commerce to Mr. Devlin for this amount which you either guaranteed, or induced the Bank of Commerce in some form, to make, and subsequently you paid to the National Bank of Commerce that amount and took up the note?

A. It might have been for pay roll purposes, that was the custom. I can't tell you in regard to this transaction now, whether it was that note or not.

Q. Before I forget it—it is a fact that practically all of these payments your company made were to take up orders that had been given by Mr. Devlin on you from time to time?

A. No, some of the transactions were of that nature.

Q. If this $20,280.00 was a transaction arranged through the Bank of Commerce, as I suggested, you took it up in pursuance to some order Mr. Devlin had given upon you?

A. Mr. Devlin very often came in at payroll time, himself, for money, we would take up an order in order that he might have arrangement for the payroll.

Q. I thought I understood you to say you remembered the specific transaction of May 23, 1905, you had with Mr. Devlin with reference to this transaction.

A. With reference to this advance, yes.

Q. You took up the note, whether it was checked or paid back by order. I want to know if you clearly remember
99 what occurred on May 23?

A. I can't remember whether it was check or order.

Q. You don't know then whether your company put up the money?

A. They put up the money.

Q. On the 23rd? A. On the 23rd.

Q. If the company paid it up on the 23d, then the loan, if it was made by the National Bank of Commerce, must have been sometime before that wasn't it, and Mr. Devlin, or his company, must have gotten the money sometime before that date, wouldn't they?

A. That is very true, it may have been so.

Q. Why do you say this $20,280.00 was money obtained and used by Mr. Devlin on May 23?

A. Because Mr. Devlin represented to us that if he took up that obligation he could get his money for the payroll.

Q. Refer to the third item, $33,247.50; you remember specifically that your company didn't pay that money to Mr. Devlin?

A. No, we paid the American National Bank, Mr. Devlin arranging for his payroll affairs through that bank.

Q. Now, when did Mr. Devlin arrange, and when did he get that $33,247.50?

A. This specific note—

Q. That is not the question Mr. Wellman.

A. I was not present with Mr. Devlin when he got the money, I can tell from the transaction.

Q. You do not know anything about when that was, do you?

A. I know the date that is stated here, May 15.

Q. That is the date you see in front of you. Do you know anything about it now when Mr. Devlin got that money from the American National Bank, of your own knowledge?

A. No.

Q. Were you a party to any conversation that Mr.
100 Devlin had with reference to getting this money from the American National Bank.

A. Not in hearing of the American National Bank.
Q. With Mr. Devlin? A. With Mr. Devlin, I was.
Q. When was that?
A. At the time we made this advance to him.
Q. That is, at the time you took up the note?.
A. At the time we took up the note.
Q. You took up the note of Mr. Devlin's in the American National Bank, didn't you? A. We did.
Q. What date did you take up that note?
A. It shows here July 3, 1905.
Q. You mean merely that on July 3 you paid the National Bank of Commerce $33,247.50, don't you. A. We did.
Q. What did the American National Bank turn over to you when you made that payment?
A. They turned over the note.
Q. A note; did you know when that note had been made and who made it?
A. It states here, I haven't the note before me.
Q. Your company now holds the note of the Mount Carmel Coal Company for this $33,247.50, which you obtained from the American National Bank, don't it?
A. I think we have it in our possession.
Q. You took that note out of the American National Bank pursuant to some previous agreement you had with Mr. Devlin that you would do so? A. Yes sir.
Q. But you don't remember, if you ever knew, that Mr. Devlin himself got the money from the American National Bank?
A. Mr. Devlin represented to us he got the money on the date we charged him.
Q. On July 23? A. On July 23.

Q. You mean to say that he got the $33,247.50 on
101 the note that you took up?
A. No, got it on a new note.
Q. I am talking about the note you took up.
A. He probably got the money May 15.
Q. Do you know anything about it or are you guessing at it, Mr. Wellman?
A. I am not guessing. I mean we are carrying out the agreement we had with him to get the note.
Q. You mean to say that you went down there and took up one of the Mount Carmel Coal Company's notes on July 3?
A. They sent it to us?
Q. Then so far as you know Mr. Devlin went down and negotiated a new loan there?
A. That was the understanding when we took up that note.
Q. Do you know whether it was done or not?
A. We had advice it was done.

Q. Have you got the note you got from the American National Bank?

A. I haven't it here.

Q. Where is it?

A. I presume it is in our papers.

Q. You refused to surrender it to the Trustees? Let me ask do or do you not claim that note obtained from the American National Bank?

Counsel for the Railroad Company objected to the question as being incompetent, irrelevant and immaterial.

The Referee: I will allow it to be answered in any way he sees fit to answer it, and I will reserve a ruling on the question.

A. I don't think we have ever arrived at any decision whether we claimed or did not claim the note. We held it for surrender. The note was sent to us for surrender. All we want is to be satisfied that the obligation we have against them will be taken up in the shape of voucher.

102 Re-direct Examination.

Questions by Mr. Smith:

Q. Mr. Wellman, in order to understand this thing, I will ask you this question. I will put a hypothetical case; Mr. Devlin would have a loan say of $20,000.00, his note in some bank—give an order on the Treasurer, or the bank would in fact, on the Treasurer, that they had his note and would like to have it paid when he furnished coal enough to the company to pay it. There was some transaction of that kind, wasn't there, from month to month? A. Yes sir.

Q. Now, when that note came due would Mr. Devlin come around and talk with you concerning it, concerning his payment, at any time when he wanted money for his payroll?

A. He did.

Q. Well now, when you paid money to satisfy these notes about the time Mr, Devlin wanted to satisfy his payroll, was that done under an agreement with him that he would pay that note and get more money?

A. That was the only agreement under which we paid it.

Q. All these payments were made then at the request of Mr. Devlin, was that he might get money somewhere for his payroll in the month you have described?

A. They were.

Q. What is the effect on a mine if the payroll is not paid to the men? Do you know?

A. I have always understood the men would walk out.

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Re-cross Examination.

Questions by Mr. Histed:

Q. Now to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on in-
103 stances had borrowed from banks a certain amount of money, possibly to meet his payroll, and then when that note came due, and his next payroll must be met, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the notes and then they let Devlin have the additional money? That is a fact is it? A. Yes.

Re-direct Examination.

Questions by Mr. Smith:

Q. Covering these items, these advances you made which aggregated with this credit $57,304.16, were those advances made under the statement of Mr. Devlin in each particular case that it was for the purpose of using the money for his payroll of the Mount Carmel Mines.

A. They were.

Witness excused.

Cyrus Leland, a witness called on behalf of the Atchison, Topeka & Santa Fe Railway Company, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Smith:

Q. Mr. Leland you were one of the Receivers, and what was the date of your appointment?

A. July 7th, I think.

Q. What was the date of your appointment as Trustee?

A. Well, it was the 19th day of December, and qual-
104 ified to take charge as Trustee the first day of January, 1906.

Q. The same persons were appointed Trustees as were Receivers?

A. The same were elected Trustees.

Q. When you were appointed receivers did you immediately take possession of the Mount Carmel Coal Mines?

A. We did.

Q. Did you continue to operate them under these contracts, so far as the Santa Fe Road was concerned?

A. I don't know much about the contract; I know they had a contract and we supplied them with coal.

Q. You knew generally what arrangement there was?
A. I had never read the contract, but I had a list of the prices.
Q. You knew there was a contract in existence?
A. Yes.
Q. At the time you took possession of the Mount Carmel Company down there what was the amount of the payroll, speaking generally.
A. Somewhere in the neighborhood of a hundred thousand dollars a month. When I was first in the business it was a little less than that; about eighty thousand.
Q. What do you mean by payroll?
A. The payroll of the officers and men in the mines.
Q. There are more men than officers?
A. Yes, I think a good many more.
Q. On an average of how much coming to each miner?
A. They mined by the ton and the payroll, the most of it, the $50,000.00, all but two or three thousand dollars would be paid to the men.
Q. How manp men would you have down there?
A. Fifteen or eighteen hundred. I understand from the Superintendant they had about two thousand miners, but they don't all work every day.
Q. How much would each one get on an average.
105 A. I haven't figured it out, but I suppose the two thousand would get about a hundred thousand a month.
Q. You have some Superintendents; how many of them?
A. There are two superintendents there.
Q. Then you have a few bosses? A. We have pit bosses, and other bosses.
Q. They are paid how? A. They are paid on the payroll.
Q. By the month? A. Yes, paid by the month, but they get their pay every two weeks, every pay day they get their share of the money.
Q. When you first went in as receiver you had to rustle to get money to pay the miners?
A. Borrowed $50,000.00 the day I was appointed.
Q. You borrowed some afterwards? A. Yes sir.
Q. They were borrowed on receiver's certificates authorized by the Court?
A. Yes, authorized by the Court. That was to pay the miners for the last half of June.
Q. What is the effect on the running of the mine like that if the miners are not paid when the wages are due?
A. We always paid them, but I understand if they are not paid they don't like to work.
Q. It is important for a mine to have the payroll satisfied very two weeks?

A. Sure, a failure makes danger of stopping business. That is the reason I thought it was very necessary to send them the money down there the 7th, because the pay day was next day.

Q. Since the receivership, on coal furnished to The
106 Atchison, Topeka and Santa Fe Road they have advanced money for these payrolls?

A. They have advanced money for payrolls every pay day after I borrowed that $29,000.00. After that they advanced money, but we had furnished more coal than they had advanced.

Q. You furnished more coal than you got money?

A. Yes, more than the payroll amounted to. I think possibly the way the payments have been made they furnished somewhere from the 4th to the 15th of the month.

Q. Are these Mount Carmel mines a valuable estate in the hands of the receivers or trustees for the Mount Carmel Estate?

A. Yes sir, very valuable.

Cross Examination.

Questions by Mr. Histed:

Q. As I understand, Mr. Leland, you have been selling coal to the Santa Fe from the time you were appointed receiver? A. Yes sir.

Q. And money that you have received from them on account of their purchase does not equal the amount of coal you furnished? A. No sir.

Q. They have paid you on account certain sums?

A. Yes sir.

Q. When you and Mr. Hurley and Mr. Reeves were appointed receivers, you in a general way parceled out your respective duties, did you not. A. Yes sir.

Q. Who took actual charge of, or supervision of the Mount Carmel? A. I remain in the office about all the time.

Q. You have had active supervision and manage-
107 ment of the Mount Carmel mine for the receivers.

A. Yes sir.

Q. Mr. Reeves, of course, lives in Streator, and looks after the Illinois property?

A. Looks after the Illinois property.

Q. At the time you were appointed receivers, did you know of any claim of any verbal contract with the Santa Fe by either Mr. Devlin or the Mount Carmel Coal Company?

A. No, I didn't.

Q. Did you ever know there was any contention by the Santa Fe Railroad Company that Mr. Devlin had attempted to make any verbal contract in any respect modifying any written lease?

Mr. Smith: We object to the question as being incompetent. We say the receivers are not purchasers in good faith.

Mr. Loomis: I will hear the testimony but will reserve ruling.

A. No, I didn't.

Q. Then of course you never undertook to assume any verbal contract and to turn over any coal pursuant to any verbal contract Mr. Devlin may have made with the Santa Fe.

A. No, I never knew of that. I might mention this: It may have been sometime in August, sometime quite a while after we had charge, when we wished the Santa Fe to advance so much money on account of paying our payrolls in different mines in Kansas, was the first I knew there was any hitch anywhere. Mr. Hurley was away and Mr. Wilder had instructions from Chicago that they could not advance money unless the back was paid for, some former advances made. I went up to Mr. Wilder's office to wire Mr. Hurley, next day was pay day. They said he had just got back. Mr. Copeland and I explained it to Mr. Hurley and Mr. Hurley said "we must pay to-
108 morrow". That money was sent, was deposited by the Santa Fe to the National Bank, Pittsburg, Kansas, subject to the order of our manager, to pay the miners next day. Always afterwards I receipted for this money, sort of a receipt whereby they didn't waive any rights. I did that thinking it didn't make any difference as receivers, as far as I was concerned.

Q. You had never, or the receivers or trustees have never undertaken to carry out this alleged verbal agreement Mr. Devlin is supposed to have made prior to the receivership?

A. I never knew anything about it.

Q. Since the claim you never undertook to carry it out?

A. I never knew anything about it. I understand they claimed they advanced money for the coal, and they had a right to the payment.

Witness excused.

Walter Reeves, a witness called on behalf the Mount Carmel Coal Company, being first duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Histed:

Q. Mr. Reeves, you are one of the receivers of the Mount Carmel Company? A. Yes.

Q. You live in Streator?

A. I live in Streator, Illinois.

Q. Do you remember when you were appointed?

A. I can't fix the exact date of the appointment here at Topeka. I was appointed receiver of some of these properties on the 14th day of July, and shortly thereafter appointed here.

109 Q. The 17th it was. A. Yes.

Q. You have been present during this hearing? A. Yes.

Q. And heard the testimony? A. Yes.

Q. I will ask you when, if ever, you heard of any claim of a verbal contract between the Santa Fe and the Mount Carmel Coal Company, or Mr. Devlin? A. Today for the first.

Q. So far as your understanding goes, under what kind of a plan was the properties being operated, the Mount Carmel properties?

A. So far as my knowledge goes there was neither a verbal nor a written one ever made between the Santa Fe Railroad and the Mount Carmel Coal Company at any time.

Q. This subject of advances, so called, made by the Santa Fe Railroad Company to the receiver during the operation of the plant, has been mentioned. I will ask you if you have had any conversation with any of the officers of the Santa Fe upon the subject of advances. A. Yes.

Q. When? A. At different times. The first, I think, with Mr. Copeland, probably the 19th or 20th of October last, and more recently with — the gentleman's name escapes me for the moment but he is assistant to the President.

Q. Mr. Jansen? A. Mr. Jansen is the name. That was a week ago today.

Q. What was the conversation with Mr. Jansen?

Mr. Smith: I object to the question as being incompetent, irrelevant and immaterial. The party mentioned had no authority to bind the road by any conversation agreement or contract.

Objection overruled.

A. I would like to state what I know about them advancing. The management of the Devlin Coal Company, by con-

110 venient arragement with the receivers, was left in my hand. When coal had been mined, after the appointment of receivers, and was needed for payroll purposes —

Mr. Smith: After the receivership?

A. Yes. I asked for money for the coal that had been mined under the receivership and delivered to the Santa Fe at Toluca, Illinois. It came finally, but with it a prepared receipt for me to sign. I haven't it with me but can give you the substance of it. The substance of it was that this money was advanced by the Santa Fe Railroad for payroll purposes, and to be used only for that purpose. I refused to sign that cha-

racter of receipt. Shortly thereafter, or some time thereafter I saw Mr. Copeland and told him I thought it was no part of the business of the Santa Fe Railroad what the receivers did with the money from coal mined and came into their hands during their administration, and I would sign no such receipts, and would use the money for any and for all purposes. I was advised Mr. Leland would sign receipts here; it was so done. I took that up a week ago today with Mr. Jansen, Assistant to the President, and asked what they meant by insisting on advancement. I didn't so regard it and would not so acknowledge it and would not so receive it. He told me that before the bills of lading for the coal had passed through the Purchasing Agent's office Mr. Hodges, and had reached the treasurer's office, so as to be bills payable we were calling upon the Treasurer, for the money and he was advancing it prior to receiving the vouchers therefor out of the Purchasing Agent's office, and they were using it in that term; so I have relied since that upon that version of what they mean by advancing money to the receivers.

Mr. Smith: I move to strike all the answer out.

Motion overuled.

111 Cross-Examination.

Questions by Mr. Smith:

Q. Now, you don't pretend to say, Mr. Reeves, you have repudiated the written contract, or lease with the Mount Carmel properties entered into by Mr. Devlin and the Santa Fe Road, and these other coal companies?

A. There has been no formal repudiation of any contract nor any formal acknowledgment by the receivers, us far as I know, with the Santa Fe or any other company.

Q. You know you are proceeding to deliver coal under the contract to the Santa Fe?

A. I don't so understand it. I understand we are selling coal to the Santa Fe upon the same terms coal had been sold to it prior to the bankruptcy of Mr. Devlin, but that we are operating under contract with the Coal Company, I do not so know.

Q. Don't you know, as a lawyer, that under this lease which does not expire for six months or a year, you could not operate it any other way?

A. No sir, I do not know that. I do not think that is correct, Judge.

Q. You think the receivers could get greater rights than Devlin got? A. No, I don't think that. I don't think that is implied in the previous question.

Q. You don't know one way or the other; whether you are operating under that lease or not? A. I know my opinion of it.

Q. You haven't repudiated that lease? A. There has been no formal repudiation that I know of.

Q. Don't you know the order is that you shall go on and mine coal? A. I don't know of it. You say the order provides we shall go on and mine coal?

Q. Yes. A. I do not know that is true; I don't know it is not true.

Witness excused.

112 Judge Smith:

We offer in evidence, the order of the District Court in the matter of the petition in bankruptcy of Charles J. Devlin, Mount Carmel Coal Company and others, which was signed by the Judge of the United States District Court the 7th day of July, 1905, and particularly that part of it which requires that "if the receivers fail to operate the mines owned by the Cherokee & Pittsburg Coal & Mining Company, in accordance with the provisions of the contract between said Cherokee & Pittsburg Coal & Mining Company, and the Mount Carmel Coal Company, then said Cherokee & Pittsburg Coal & Mining Company may at once take possession of said mines and operate the same as fully as if said lease had never been made" and the further part of the order that "for indebtedness existing for the pay of wages due to workmen, clerks and servants, which have been earned within three months before the commencement of this proceeding, not to exceed three hundred dollars to each claimant, shall be paid in full by the receivers."

Mr. Loomis: It will be admitted in evidence.

Mr. Histed: It is further admitted that on the 17th day of July, 1905, Walter Reeves was appoined an additional receiver of the Mount Carmel Coal Company and other properties, having the same powers and duties as the other receivers, and that he acted as receiver in the Mount Carmel case under this original order in the Charles J. Devlin case.

113 In the District Court of the United States for the District of Kansas First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re Petition of Atchison, Topeka and Santa Fe Railway, et al.

Stipulation.

It is agreed that the petitioners, the Atchison, Topeka and Santa Fe Railway Company, may offer as testimony the affidavit of W. H. Rossington made on the 15th day of January, 1906, and the said affidavit shall be treated as though the witness were present and offering to testify to said matters contained therein, before the Referee, and shall be subject to all objections which the Trustees might make thereto if the said witness were present and testifying orally.

CLIFFORD HISTED,
Attorney for Trustees.

In the District Court of the United States for the Dis-
114 trict of Kansas First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

Affidavit of W. H. Rossington.

State of Kansas,
Shawnee County.—ss

W. H. Rossington, being first duly sworn, deposes and says: About the 19th or 20th of June, 1905, I was sent for by Geo. R. Peck to come to the house of the late Charles J. Devlin. On arrival I found Mr. Peck and Mrs. Devlin and some one else—I have forgotten whom, but some one intimately connected with Mr. Devlin's household or business. I had just returned from Chicago, where I had left Mr. Peck late on the day of the 19th, I think, and had no idea that he was in Topeka until I was telephoned by him, and was then informed by Mrs Devlin and by Mr. Peck that Mr. Peck had been telegraphed for owing to an important and delicate crisis in the affairs of Mr. Devlin. Mr. Devlin had a few days before been visited with a stroke of apoplexy, and I had learned of that fact for the first time on my arrival home. Mr. Peck at once went into a consideration of the matter that called him to Topeka, and it was this: Mr. Devlin's illness was of such a nature that he could not give any attention to his affairs then and probably not for an indefinite period of time. That he had a slight hemorrhage upon the brain which was in process of being absorbed. His condition was considerably improved and his progress towards recovery depended wholly upon the fact that he did not take any part in his business or even be interrogated about it I was for the first time informed that he owed a large amount of money, but that he had assets that were of

three or four times the value of his debts, but so far
115 as they knew they had no ready money to meet the urgent and impending current expenses of carrying on the coal business. That something like 2,000 men were employed by the Mount Carmel Coal Company and these men were paid every fortnight. I learned these facts first from Capt. Peck and from Mrs. C. J. Devlin and afterwards from Col. J. D. Norton, who was in the general management of the affairs of the Mount Carmel Coal Co., at its office in the city of Topeka. This conversation was, I believe on Wednesday of that week,-I will not be so sure of that,—but at all events the pay roll was due and payable on Saturday of that week, and there was therefore only two or three days in which to raise these funds. A general conversation ensued in reference to the affairs of Mr. Devlin which have no particular bearing upon the matter in question here, and then Mr. Peck and myself repaired to the office of the Mount Carmel Coal Co., in Topeka and entered upon a conference with Col. Norton, who confirmed all that had been said, who did not know where he could realize any money, who for the first time told me that their bank credits had been practically exhausted and then and there the matter was discussed with reference to the consequences that would flow from failure to pay these men promptly. It would be impossible to explain to them that by reason of Mr. Devlin's sickness the money for their pay would not be forthcoming. They would be there for their pay and expecting it and a failure to pay it would result in an immediate strike, and this strike would be followed by a crisis in Mr. Devlin's affairs by possibly bringing down upon him and his various companies
all of their creditors in a mad scramble to secure their
116 debts, and also an immediate closing of the mines. I was also informed at that time by Mr. Norton of the nature of the tenure of the Mt. Carmel Coal Company of its mining properties in Southeastern Kansas. I learned that they were held upon a lease from the Atchison, Topeka and Santa Fe Railway Company. The condition of that lease was that the Mount Carmel Company should operate uninterruptedly the mines and daily furnish to the Railway Company coal for the operation of its railroad. A failure to operate the mines, therefore, would work a forfeiture of the lease. That all these catastrophes would follow a failure to obtain the money. I think it was Mr. Peck who suggested, "Well, will not the Santa Fe advance the money?" when we were appalled to learn from Mr. Norton that the last two months' accounts with the Santa Fe had been hypothecated for money for this very purpose, viz., to pay off the operatives in the coal mine, and there was no money coming at the end of the month of June on account of the coal furnished to the Santa

Fe, but on the contrary that the coal that was agreed to be furnished on account of these advancements was still in arrears. Mr. Jobes came up that evening from Kansas City and at a conference held at that time between Mr. Jobes, Col. Norton and myself, it was agreed that Mr. Jobes and Mr. Peck should make an effort to raise the money in Chicago by pledging or selling some of Mr. Devlin's properties. I held a long telephone conversation with Mr. Peck the next day and then learned for the first time that there were none of the properties of Mr. Devlin or that were operated under his name and were treated as his, that could be handled for that purpose, because Mr. Devlin had hypothecated the stock and bonds of all of these companies, not to one person or one bank, or one individual, but in parcels to many banks and to
117 many individuals; that there was nothing free or loose that could be handled. I communicated with Mr. Peck I think twice or three times that day, and was informed among other things that Mr. Peck had had an interview with the Santa Fe people, but without result, the proposition being, as I understood it, to have them advance money on security to be furnished. Later on, however, Col. Norton on his own account visited Edward Wilder, who had just returned, if I remember right, from a protracted absence taken for the sake of his health, and had told him in general terms the situation. I learned this from Col. Norton, and that Mr. Wilder, being [appraised] of the situation, had then and there agreed to advance the money upon the potential bills or sums receivable from the Santa Fe by the Mt. Carmel Coal Co., for, I think, the month of July. I know that this advancement caused great rejoicing, because it prevented the catastrophe which would have occurred in Mr. Devlin's affairs, and which would have in a measure, if not absolutely, prevented holding his property together against proceedings of insolvency in the United States Court—would in other words, have prevented the handling of the properties as they are now being handled, in all likelihood, and two weeks were thereby gained in which to confer concerning and arrange Mr. Devlin's affairs to prevent his possible bankruptcy. The money, as I understood it and was informed by Mr. Norton, was available solely for the payment of the current pay rolls of the Mt. Carmel Company, and amounted as I remember to $41,000 or $43,000.

W. H. ROSSINGTON.

Subscribed and sworn to before me this 15th day of
118 January, 1906.

E. B. NELSON,
Notary Public.

Seal N. P.
My commission expires Jan. 18, 1907.

In the District Court of the United States for the District
119 of Kansas First Division.

In the matter of The Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

In Re: Petition of Atchison, Topeka & Santa Fe Railway, et al.

The trustees make the following objections to the testimony of W. H. Rossington, in form of affidavit offered by the petitioners:

I.

To all that part of the testimony beginning with the words, "On arrival I found Mr. Beck, Mrs. Devlin and someone else" on page 1, and continuing to the sentence "I learned these facts first from Captain Peck, etc," on page 2, because the same is hearsay and immaterial, and amount to deduction, conclusions and inferences, and is not a statement of facts relevant or germain to the issue before the Referee.

II.

In the sentence immediately following "I learned these facts first from Captain Peck and from Mrs. Devlin, and afterwards from Col. J. D. Norton, who was in the general management of the affairs of the Mount Carmel Coal Company at its office in the City of Topeka," the trustees object to all of the testimony contained in said sentence,

1. Because it does not purport to give a conversation but a mere conclusion and inference therefrom.

2. Because any declaration made by either Capt. Peck or Mrs. C. J. Devlin could not be binding upon the Mount Carmel Coal Company or these trustees.

120 3. Because the statement of the relating of Col. J. D. Norton to the Mount Carmel Coal Company is a conclusion and not a statement of fact.

4. Because any statement or declaration made by Col. J. D. Norton to the witness, a stranger to the transaction, and not in preformance of any duty by the said Norton for the Mount Carmel Coal Company, would be hearsay, inadmissible and not binding upon either the Mount Carmel Coal Company or the said trustees.

III.

The trustees object to all that portion of the affidavit beginning with the words, "This conversation was I believe, on Wednesday, etc." on page 2, and continuing to the words, "Later on, however, Col Norton on his own account, etc." on page 4, because all of the matter contained in said affidavit thus indicated is hearsay and deductions, conclusions and inferences drawn by the witness, and not the statement of any fact relevant to any issue involved in this hearing, and the same and all of said testimony thus objected to is incompetent and inadmissible against these trustees.

IV.

The Trustees object to the following testimony, "Later on, however, Col. Norton, on his own account, visited Edward Wilder, who had just returned, if I had remember right, from a protracted absence taken for the sake of his health, and had told him in general terms the situation. I learned this from Col. Norton, that Mr. Wilder being[appraised]of the situation had then and there agreed to advance the money upon the potential bills or sums receivable from the Santa Fe by the Mount Carmel Coal Company for, I think, the month of July, appearing on page 4 of said affidavit, because:

1 The same is hearsay and no authority on the part
121 of the said Col. Norton to bind the said Mt. Carmel Coal Company by any agreement with the said Edward Wilder or otherwise, does not appear.

2. Because the same is a statement of a conclusion derived from a supposed conversation with Col. Norton, and is not a statement of facts.

3. Because any declarations made by the said Norton to the witness were not in the scope of authority of the said Norton, and not in the furtherance or prosecution of any business of the Mr. Carmel Coal Company, and are inadmissible against it and against these trustees, and said testimony and each and every part thereof is incompetent and irrelevant to the issue pending before the Referee.

V.

The trustees further object to all of the remaining portions of said affidavit beginning with the words, "I know that this advancement caused great rejoicing, etc" because it is immaterial, and a mere statement of the conclusions and private belief and notions of the witness, and not the statement of any facts in the case.

VI.

And the trustees generally object to all of the said testimony contained in said affidavit because of the further fact that it does not relate to any issue tendered by the petition in this case, and does not bear upon any transaction or account or item thereof set forth, in the petition in this case and relied upon by the said petitioners.

CLIFFORD HISTED,
Attorney for Trustees.

122 In the District Court of the United States for the District of Kansas, First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt.

In Bankruptcy.

On petition of The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal & Mining Company.

The Court having heretofore heard the evidence in the matter of the petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal & Mining Company, praying for an order on the Receivers requiring them to deliver to The Atchison, Topeka & Santa Fe Railway Company a certain amount of coal to carry out the provisions of a certain contract, or authorize the said petitioners to cancel said contract and to take possession of the property therein referred to; and the court also having heretofore heard the arguments of counsel and being fully advised in the premises, finds that the application of the said petitioners should be denied.

It is therefore ordered accordingly this 27th day of January, 1906.

N. H. LOOMIS,
Special Referee.

Endorsed: No. 816. In the District Court of the United States for the District of Kansas, First Division. In the matter of The Mount Carmel Coal Company, Bankrupt. In Bankruptcy. On petition of The Atchison, Topeka & Santa Fe Railway Company and others. Record for review certified to the Judge by the Referee. Filed Feb. 10, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

123 In the District Court of the United States for the District of Kansas, First Division.

In Re Mount Carmel Coal Company, Bankrupt. No 816. In Bankruptcy.

Order and Decree.

And now on this 24th day of February, 1906, this cause and matter above entitled came on to be heard on the petition filed by The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, and upon a transcript of the evidence and all other proceedings had before Hon. N. H. Loomis, Special Referee in Bankruptcy in the above entitled cause and matter, for review of an order made by said N. H. Loomis, Special Referee, denying to the petitioners the relief prayed for in their said petition filed in said cause and matter.

The petitioners appears by W. R. Smith and Robert Dunlap, their attorneys, and the bankrupt appeared by C. Leland, Jr., Trustee for said Bankrupt, and by Clifford Histed, his attorney.

After reading the evidence as contained in said transcript and proceedings had before said special referee, N. H. Loomis, and hearing arguments of counsel for all of the interested parties, the said cause and matter was taken under advisement by said District Court and afterwards, to-wit, on the 5th day of March, 1906, having fully considered the evidence contained in said transcript, and the proceedings had before said N. H. Loomis, Special Referee, and the arguments of counsel, and being fully advised in the premises,

It is on this 12th day of March, 1906, ordered by said District Court that the prayer of said petitioners be denied and that the order heretofore made by said Special Referee in
124 said cause and matter be and the same is hereby in all things affirmed and approved.

The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company at the time duly excepted and excepts to the findings, decision and order of the Court and each of them, and to the rendition of said order and decree and every part thereof.

JOHN C. POLLOCK,
Judge of the United States District Court.

Endorsed: No. 816. In Re. The Mount Carmel Coal Company, Bankrupt. Order and Decree. Filed March 12th, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

In the District Court of the United States, District of
125 Kansas, First Division.

In Re Mount Carmel Coal Company, Bankrupt.
No. 816 Bankruptcy.

Memoranda of Decision on Petition of The Atchison, Topeka & Santa Fe Railway Company, the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company for Review of an order made by N. H. Loomis, Special Referee in Bankruptcy, denying petitioners certain relief prayed as against the Receivers and Trustees of the Bankrupt.

This controversy arises over the terms of a certain tripartite agreement or lease entered into between The Osage Carbon Company and The Cherokee & Pittsburg Coal & Mining Company, owners of certain large coal properties, as parties of the first part, The Mount Carmel Coal Company, now bankrupt, party of the second part, and The Atchison, Topeka & Santa Fe Railway Company, party of the third part, by the terms of which the bankrupt was to operate the coal properties on terms therein specified until June 1, 1906, and sell a portion of the product from said mines to the railway company at prices fixed in said agreement during the term thereof. In the month of July, 1905, The Mount Carmel Coal Company was adjudged a bankrupt. The present trustees were, by order of this court, appointed receivers of the property of the bankrupt company, and have as such receivers and trustees in bankruptcy under the order of this court performed fully the terms of the contract as it is written, with the coal company and the railway company.

126 The origin and exact nature of the claim made by petitioners is fully set forth in the written opinion of the referee, Hon. N. H. Loomis, filled therein, as follows:

"The petitioners entered into a contract with Charles J. Devlin on or about the first day of October, 1896, whereby they leased to him certain coal and mineral rights in Osage and Crawford counties, Kansas, for a term of three years. The lease provides for the payment of certain royalties by Mr. Devlin for coal taken from the leased premises, and also makes provision for the furnishing of certain amounts of coal to The Atchison, Topeka & Santa Fe Railway Company (hereinafter called the Santa Fe Company), one of the lessors, at prices specified in the lease. On the first day of March, 1897, this lease, by and with the consent of the petitioners, was duly assigned by Charles J. Devlin to The Mount Carmel Coal Company.

"The said lease was modified and its terms extended by subsequent agreements until June 1, 1906. The extension agreements required the Mount Carmel Coal Company to give a bond in the sum of $100,000.00, conditioned for the faithful performance of the terms of the contract.

In the conduct of its business it become necessary for The Mount Carmel Coal Company to borrow money from time to time, with which to meet its pay rolls. At times the credit of The Mount Carmel Coal Company became exhausted and it was unable to borrow money from the banks without first taking up obligations held by them. Upon such occasions the Coal Company, through its President, Chas. J. Devlin, would make application to the Santa Fe Company for assistance in the way of procuring funds with which to meet its pay rolls.

"The manner in which this was done is well summarized in the testimony of Mr. Wellman, Assistant Treasurer of the Santa Fe Company, on re-cross examination. It reads as follaws:

Q. Now to summarize the statement you have made to Judge Smith, I understand you that Mr. Devlin, on instances, had borrowed from banks a certain amount of money, possibly to meet his pay roll, and then when that note became due, and his next pay roll might be maintained, he was not able to raise the money by further loans from those banks until he had paid for the notes he had negotiated at these banks, and that your company advanced the money to those banks and took up the the notes, and then they let Devlin have the additional money. That is the fact, is it? A. Yes.

"The testimony also shows that these advances made by the Santa Fe Company to enable the Mount Carmel Coal Company to meet its pay rolls, were to be paid by the delivery of coal under the terms of the lease above referred to.

"Article XXII of the lease covers the sale and delivery of coal to the Santa Fe Company, and reads as follows:

ARTICLE XXII.

"Said C. J. Devlin shall sell and deliver to the Railway Company, on its cars at the mines (except in case of accidents, strikes or causes beyond his control) and the Railway Company shall purchase, in such quantities as are required daily, all the coal required by it in the operation of the lines of railroad in Kansas, as far west as and including Newton, which, it may own, control, or operate, and such portion of its supply
127 from Kinsley to Newton, including Kinsley and tributary branches, as it may from time to time elect, Provided, that the supply for Atchison, and Leavenworth, may be bought from other parties than said C. J. Devlin, at the election of the Railway Company, and Provided, Further, that the coal supply herein contracted for may be increased to an amount not over 50,000 tons per year for use on lines other

than those described in this article, if owned, leased, controlled or operated by the Railway Company. All coal so taken by the Railway Company shall be upon the following terms and conditions:

"1. That lump coal so furnished shall be screened lump coal, as free from slack, slate and other impurities, as the nature of the coal will permit, by the use of the usual appliances for screening and preparation.

"2. That the railway Company shall have the right to inspect the coal at the mines and may reject any which is no screened and prepared as above specified.

"3. That the railway Company shall pay to said C. J. Devlin on or before the 15th day of each month, for all coal so delivered during the preceding calendar month, per ton of 2,000 pounds, track scale weights at the mine, as follows:

(a) One dollar and forth-nine cents ($1.49) per ton, mine run coal in the Osage District.

(b) One dollar and fourteen cents ($1.14) per ton screened lump in the Cherokee District.

(c) Eighty-nine cents ($.89) per ton mine run coal in the Cherokee District.

(d) Twenty cents ($.20) per ton, slack coal, in the Cherokee District.

(e) One dollar and six cents ($1.06) per ton for lump and nut coal mixed, in the Cherokee District.

"4. That the Railway Company shall have the right at all reasonable times, to examine the track scales and to inspect the books and papers pertaining to the weighing of the coal.

"5. That in the event of accident or strike at the Cherokee & Pittsburg Coal & Mining Co.'s. mines, which prevents said C. J. Devlin supplying coal from that mine, or if the Railway Company shall elect to take all or any part of its coal supply from other mines controlled by said C. J. Devlin, then the railway company shall itself pay the trackage or switching charge on such coal.

"6 That if C. J. Devlin is obliged to pay an advance in the prices now paid to miners for mining coal, which are,

Osage City, yearly	$1.25	per ton.
Peterton, "	1.21	"
Scranton, "	1.03	"
Frontenac, summer	.87 1-2	"
" winter	.95	"

128 then the price to be paid by the Railway Company shall be increased to the extent of such advance in mining prices,

and in the event of a reduction in the mining prices, the price to be paid by the Railway Company shall be reduced to the extent of such reduction in mining price, provided, that if coal shall be mined at any mine or place other than those above mentioned, then said coal shall, within the meaning of this article, be treated in precisely the same manner as if mined at that mine or place above mentioned, to which it is nearest in location.

"7. That in case the railway company shall elect within one year after October 1, 1896, to take its supply of coal for any other portion of its lines during the balance of the term hereof from the mines hereby leased, said C. J. Devlin shall furnish such coal at the same price as hereinbefore provided, upon receiving at least ninety (90) days' notice of the approximate quantity of coal required daily."

"It is claimed by petitioners that at the time the arrangements were made by the Santa Fe Company to advance money to enable the Mount Carmel Coal Company to meet its pay rolls as aforesaid, that the terms of the written contract between the parties were modified by the oral agreement with respect to advancing money and receiving pay therefor in coal to be furnished by the Coal Company, and that the agreement with respect thereto became a part of the original contract and subject to all of its terms.

"Under the terms of the written lease the contract may be declared forfeited by either party for failure to comply with its terms. The forfeiture clauses read as follows:

"Article XVII.

"This lease and agreement shall continue for three (3) years from the date hereof, but may be terminated by and at the option of the three parties hereto as follows:

"(a) By the Coal Companies, or the Railway Company, for a failure by said C. J. Devlin to perform any of his obligations, covenants or agreements, if within thirty (30) days after written notice of such failure, and the nature of it, he does not cure such failure by performance, satisfactory to said Coal Companies and to the Railway Company.

"(b) By said C. J. Devlin for a failure by either of the other parties to perform its obligations, if within thirty (30) days after written notice of such failure and the nature of it, it does not cure such failure by performance, satisfactory to said C. J. Devlin.

"In the event of a termination by either method aforesaid, such termination shall operate as to all parties hereto and extend to all the provisions hereof, except such as from their

nature are to be performed in the event of termination, but such termination, or right to terminate, shall not effect the right to recover damages for any such failure, or in any way relieved either party from his or its covenants and agreements hereunder.

"Article XXI.

"If the said C. J. Devlin shall fail to pay the rental or royalties herein reserved, or any part thereof, on the day when the same become due and payable under the provisions hereof, and shall continue in such default for thirty (30) days, or if default shall be made by him in any of his covenants and agreements herein contained, it shall and may be lawful for
129 said Coal Companies, their attorneys, agents or assigns, at their election, to declare the term herein provided for ended, and unto the said demised premises, or any part thereof, either with or without process of law, to re-enter, and the said C. J. Devlin, or any other person or persons occupying, in, or upon the same, to expell, remove and put out, using such force as may be necessary in so doing, and the said premises again to repossess and enjoy, as their first and former estate; and to distrain for any rent, royalty or other sum that may be due hereunder, upon any property belonging to the said C. J. Devlin, whether the same be exempt from execution and distress by law or not, and said C. J. Devlin in that case hereby waives all legal rights which he now has, or may have, to hold or retain any such property under any exemption laws now in force in this state, or in any other way, meaning and intending hereby to give to the said Coal Companies, their successors and assigns, attorneys or agents, a valid and first lien upon any and all goods, chattels or other property belonging to said C. J. Devlin which said C. J. Devlin may place upon the demised premises, as security for the payment of said rentals, royalties and other sums in the manner aforesaid, anything hereinbefore contained to the contrary notwithstanding, and at the end of the term herein provided, or sooner in case of termination as provided in Article XVII hereof; or, in case said C. J. Devlin shall fail to promptly and properly keep and perform each and every one of his covenants, undertakings and agreements herein provided for, the said C. J. Devlin covenants and agrees to surrender and deliver up said demised premises and property, peaceably to the said Coal Companies, their successors, attorneys, agents or assigns, immediately upon such termination of said term; and if said C. J. Devlin shall remain in possession of the same after notice of such default, or after the termination of this lease, in any of the ways above named, or as fixed herein, he shall be deemed guilty of a forcible detainer of the premises under the statute, and shall be subject

to all the conditions and provisions hereof, and to eviction and removal, forcible or otherwise, with or without process of law, as above stated."

"It is claimed by the petitioners that inasmuch as the verbal agreement to advance money to meet the pay rolls became engrafted upon the original lease and constituted a modification of it, that the failure to furnish sufficient coal to pay advances made, constitutes a breach of the contract which permits a cancellation of the lease, and that the Trustees in bankruptcy should be compelled to pay the full amount due on the advances made to the Mount Carmel Coal Company, or that petitioners be permitted to exercise their option on cancelling the contract.

"Expressed in the language of the petition, the claim and prayer of petitioners are as follows:

"That by reason of said failure to comply with the provisions of said contract and the delivery of coal, the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and Cherokee & Pittsburg Coal & Mining Company are entitled to declare said contracts and leases forfeited and void, and are entitled to the possession of the property covered by said lease, unless the receivers appointed in said bankruptcy proceedings are directed and instructed to deliver to said The Atchison, Topeka & Santa Fe Railway Company coal in an amount sufficient to liquidate the indebtedness created as aforesaid.

"Your petitioners therefore pray that J. E. Hurley, Cyrus Leland and Walter Reeves, Receivers appointed in the above entitled proceeding in bankruptcy, be directed either to deliver to said The Atchison, Topeka & Santa Fe Railway Com-
6 pany an amount of coal sufficient to carry out the provisions of the contracts hereinbefore set forth, as modified by the verbal contract between the said Mount Carmel Coal Company and The Atchison, Topeka & Santa Fe Railway Company, as hereinbefore set forth; or that said receivers be ordered and directed to deliver over the possession of all the lands and properties described in said written contracts hereinbefore set forth, upon the payment to said receivers of the amount provided to be paid to said Mount Carmel Coal Company under the terms of said leases, and that the property of said Mount Carmel Coal Company, for which said payment is made, be at the same time turned over to said Cherokee & Pittsburg Coal & Mining Company, The Osage Carbon Company and The Atchison, Topeka & Santa Fe Railway Company, in full compliance with the terms and provisions of said contracts.

"It is also claimed by petitioners that there are strong equities in their favor, which should be given consideration by the court, [frowing] out of the fact that the assistance given by them prevented the closing down of the mines and consequent disasters, and that the rights of the creditors were protected and the possibilities of receiving dividends greatly increased thereby.

"The advances made by the Santa Fe Company which are before the court for consideration, are three in number and were made under the following circumstances:

"First. On April 15, 1905, the account of the Mount Carmel Coal Company with the Santa Fe Company was overdrawn to the extent of $24,63.16. The Santa Fe Company had paid to the Coal Company that much more than it was entitled to receive on account of coal delivered. In order to settle this account the Coal Company gave to the Santa Fe Company two drafts, with the understanding that if the drafts were not paid they would be charged against the amounts due it for coal for the next month. One draft was for $10,000 and the other for $14,063.16. The $10,000 draft was paid on June 19, 1905. The other draft was extended until July 1st, upon the promise of the Coal Company to pay it upon that day. It was not paid upon that date and Mr. Devlin, President of the Coal Company, was informed sometime between July 1st and July 28th that the amount of it would be charged against the proceeds from coal due the Mount Carmel Coal Company. The charge against its accounts was actually made on July 29th, 1905, The moneys advanced the Mount Carmel Coal Company, which constitute the aforesaid item of $24,063.16, were advanced in the manner heretofore stated, for the purpose of enabling the Mount Carmel Coal Company to meet its payrolls. Just when they were made is not disclosed by the testimony.

"Second. On May 23, 1905, $20,280.00 was advanced the Mount Carmel Coal Company by the Santa Fe Company to enable it to meet its payrolls. The advance was to be paid by July 1905 coal vouchers. The Testimony [us] uncertain as to whether the money was paid direct to the Coal Company or whether it was to be [ised] to take up a note due the National Bank of Commerce at Kansas City, and a new note given by the Coal Company to the bank to raise the necessary funds to meet its payrolls.

"A question propounded to Mr. Wellman and his answer thereto, found on page 15 of the transcript of testimony, would indicate that the money was used to take up some obligation. They are as follows:

"Q. Why do you say this $20,280 was money obtained and used by Mr. Devlin on May 23rd?

"A. Because Mr. Devlin represented to us that if
131 he took up that obligation he could get his money for the payroll"

"Third. The third item amounting to $33,247.50, was advanced to the Coal Company to take up a note for that amount due the American National Bank of Kansas City. This was done to enable the Coal Company to borrow a similar amount from the bank to meet its payrolls. The money was paid to the bank and the note taken up on July 3, 1905. The note was turned over to the Santa Fe Company by the bank and it is now in possession of that company.

"Various credits have been allowed against these advancements, as appears by an exhibit attached to the petition, reducing the amount of petitioners' claim to $57,304.16."

At the oral argument and in the written briefs filed on behalf of petitioners any and all claim of subrogation to the rights of the miners whose demands were paid off and discharged out of the money advanced by the railway company is disclaimed by petitioners. Also, any and all right of petitioners to preferential payment of the money so advanced out of the bankrupt estate is as expressly and positively disclaimed. The sole insistence of petitioners in this court is, that as between the bankrupt and the petitioners the written contract was, before the institution of the proceedings in bankruptcy, modified by an oral agreement entered into when the money was advanced, that the bankrupt was in the months of July and August 1905, to deliver to the railway company coal at the prices named in the contract sufficient in amount to discharge the obligation incurred by the bankrupt to the railway company on account of the advances made; that such oral modification entered into and formed a part of the contract between the parties at the date of the institution of the bankruptcy proceedings in this court and the appointment of the receivers. Therefore, it is contended equity will not permit the trustees to now assume and carry out the terms of the contract as it stands written because by them deemed beneficial to the bankrupt estate, but that if the trustees elect to assume performance of the contract at all they must undertake it with all its burdens and must either furnish the coal agreed to be furnished by the bankrupt to the railway company in accordance with the
132 terms of the claimed oral modification of the agreement, or forfeit all rights under the lease and surrender the leased premises to petitioners, and it is so prayed.

The referee on full hearing and consideration of the matter was of the opinion the agreements under which the sums of money advanced by the railway company were

furnished, were separate undertakings not entering in or forming a part of the written agreement, and in consequence the receiver and trustees might assume and perform the obligation of the written contract without assuming or obligating the estate or themselves to mine and furnish the coal claimed by the railway company in payment of the advances made. And their failure or refusal to so do does not work a forfeiture of the right to demand performance of the terms of the written contract by the coal companies and the railway company. The decision of the referee on the facts stated is as follows:

"I am unable to find any testimony indicating an intention to modify the written lease as claimed by petitioners. There certainly was no express oral agreement to that effect. It is true, the advances were to be paid by money due the Coal Company for coal furnished the Santa Fe Company, and the money, instead of being paid under the terms of the written contract, would be kept to reimburse the Santa Fe Company for money advanced. But this amounts to the same thing as saying that the Santa Fe Company merely paid for its coal in advance, although not required to do so by the terms of the contract. I cannot construe this to mean that the written contract was necessarily modified by the agreement to advance moneys to meet the pay rolls. I regard the verbal agreement as a separate, independent, parol contract, in no respect inconsistent with the written contract. I am of the opinion that it did not become a part of the main contract by express agreement or necessary implication, and that the Santa Fe Company is not entitled to a cancellation of the lease on account of a failure to furnish coal to pay advances made, to meet pay rolls.

"Although there are equities in favor of petitioners' claim, by reason of having advanced money to meet pay rolls and keep the Mount Carmel Company a going concern, I can find nothing in the law which will justify the court in giving the claim priority over those of other creditors.

"It must be apparent that the advances were for the benefit of the Santa Fe Company as well as the Mount Carmel Coal Company. It was important that it be kept supplied with coal to operate its road, and the shutting down of these mines might have caused embarrassment to the Santa Fe Company. Furthermore, its interest in the mining properties leased to the Mount Carmel Company was protected by keeping the
133 property in operation.

"The testimony also shows that the advancements were made in accordance with a practice which had been followed for a considerable time.

"An order will be entered denying the relief prayed for by the petitioners.

"All objections made by the attorney for the Trustees, where ruling was reserved, are overruled."

From a careful reading of the record in this matter and consideration of the briefs and argument of solicitors, in my judgment the conclusion reached by the referee is right and should be confirmed, and this for many reasons. First, I am of the opinion the transactions by which the money was advanced by the treasurer of the railway company to the bankrupt were completed transactions, by reason of which the bankrupt became indebted to the railway campany for so much money, and that such transactions are wholly independent of, separate and apart from the original contract between the parties. True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in the months of July and August as claimed. But at the time of the failure of the bankrupt the coal remained in the ground, unmined. None had been raised and none set apart as a fund to pay the debt. The contracts under which the money was advanced created no lien upon any property for its repayment. The railway Company simply advanced to the bankrupt company money to enable it to meet its engagements arising out of the transaction of its business and charged interest thereon to be settled and paid in coal at a future date and at a fixed price. It is not contended any agreement was made by which the railway company bound itself to make like advances in future should the occasion arise. The transaction in its legal significance is not different from that had a bank or other person furnished the money, taken the obligation of the bankrupt to repay at a certain time with interest.

In such case the bank would have a perfect legal de-
134 mand for repayment of the money but would be simply a contract creditor of the bankrupt, holding a general unsecured claim against the estate in the hands of the receivers or trustees.

Again, it is well settled, "An adjudication of bankruptcy absolves the bankrupt from no agreements, terminates no contracts and discharges no liability. * * Its effect is to transfer to the trustee all the property of the bankrupt except his executory contracts, and to vest in the trustee the option to assume or to renounce these. * * * His trustee does not become liable for his debts, but he does acquire the right to

accept and assume or to renounce the executory agreements of the bankrupt, as he may deem most advantageous to the estate he is administering, and the parties to those contracts which he assumes are still liable to perform them." This is the language of Judge Sanborn delivering the opinion in Watson V. Merrill, 136 Fed. 359.

The order appointing receivers in this case authorized them to borrow sufficient funds to meet the pay rolls of miners wages then presently due in order that the operation of the mines in question should not cease to the detriment of the estate, the railway company and coal companies as well. This was done, and receivers notes creating a paramount lien on all the estate of the bankrupt were authorized and issued and thus the grounds for forfeiture specified in the written lease were avoided. The trustees represent both the secured and unsecured creditors. To now hold the oral agreement made between the bankrupt and the railway company, (unknown to the receivers and the court at the time of their appointment) entered into and formed a part of the written contract of lease, requiring the money raised by order of court to be employed in the production of coal to meet the claims of petitioners now made, or that the contract thus sought to be perpetuated for the benefit of the estate of the bankrupt, and petitioners as well,
135 should be forfeited, would be, to my mind, so manifestly unjust to the creditors of the bankrupt, and particularly the secured creditors, as to require its denial on the ground of natural justice.

Again, as has been seen from the facts stated, the written agreement of lease made among the parties definitely and positively specifies the acts of omission or commission which shall work a forfeiture of the lease, and also definitely and positively states the time and manner in which such forfeiture shall be declared and enforced by the party or parties injured by the default of the other. It is now sought by petitioners not alone to engraft upon the written lease a new contract or agreement between the parties of which no mention is made in the writing, but also by reason of the breach of such new obligation thus created to have the court order a performance of the obligation which would work a preference in favor of the railway company over the other creditors of the bankrupt, (the right to which preference is by the railway company expressly disclaimed) or to decree a forfeiture of the lease on a ground neither specified therein in writing nor claimed to have been made as a part of the oral agreement. To my mind this may not be done, and for this reason. Suppose for the sake of argument the agreement made between the railway company and the bankrupt to repay the advances made in coal in future at the rate specified in the contract had by consent of all the

parties thereto been endorsed upon or written into the lease, and this obligation had from that time forth formed a part of the written lease, and as in this case had not been performed by the receivers or trustees, would such failure be ground for forfeiture of the lease? I think not. In the making of the lease as written, the parties agreed the breach of certain conditions therein stated should work a forfeiture. It was not agreed at that time any money should be advanced by
136 the railway company to the bankrupt to be repaid in future in coal, hence of necessity it was not agreed a failure to so repay any advances made would work a forfeiture of the lease. When such agreement for advances was subsequently made no forfeiture for failure of performance of this new covenant was expressly stipulated among the parties, and none can be implied. It would simply be a new and independent agreement or covenant engrafted on the lease, the breach of which would have rendered the bankrupt liable to an action by the railway for repayment, had bankruptcy proceedings not intervened, but would not be such a breach of condition as would work a forfeiture of the entire lease as to all parties, because it was not so stipulated and agreed.

In 18 A. & E. Encycl. of L., 2d ed. 369, it is said:

"The common-law rule is well settled that a breach by the lessee of his covenants or agreement in the lease does not work a forfeiture of the term in the absence of an express stipulation in the lease or the reservation of a power of re-entry in case of such breach. The general remedy of the lessor in such a case is merely by action for the recovery of damages. This rule applies with regard to implied covenants; express covenants, to pay rent; covenants to pay taxes; covenants not to assign or sublet."

In re Hague v. Ahrens, 53 Fed. 58, it is said:

"The law regards conditions with the same disfavor it does forfeitures; and for similiar reasons. A clause will not therefore be treated as a condition of it can be construed a covenant without violence to its terms. If the purpose to create a condition or conditional limitation, is not expressed in clear, unequivocal language—as the courts have frequently said in "apt terms", such as "upon condition", "provided nevertheless," "so long as," "during," etc.—the clause will be treated as a covenant, simply. The provision under consideration does not contain such language. The terms, "This lease shall not be sold, assigned, or transferred, without the written consent of the party of the first part," convey no suggestion even that the leave may be lost by such transfer. They express simply an agreement by the lessee, who alone could make the trans-

fer, that he will not do it. If the lessor was not satisfied with the remedy which the law affords for breaches of such agreements he should have stipulated for another by adding terms of condition or forfeiture. That he knew very well how to do this, and had it in mind, as respects breaches of other provisions of the lease, is shown by the following clause: "A failure to pay the money after demand made, or put down the well, as hereinafter stipulated, shall forfeit this lease within one year from the date hereof." The inference is strong, therefere, that he did not contemplate similar consequences as the result of a transfer."

To like effect is In re Pennewell, 119 Feb. 139; Doe
137 v. Godwin, 4 Maule & S. 265; Crawley v. Price, L. R. 10 Q. B. 302; Den v. Post, 25 N. Y. Law, 285; Spear v. Fuller, 8 N. H. 174; Wheeler v. Dascomb, 3 Cush. 285; 1 Washb. Real Prop. sec. 504.

In the light of these authorities, I am persuaded, had the subsequent independent contracts for advancements made entered into and formed a modification of the original lease, as claimed by petitioners, its non-performance by the bankrupt or the failure of the receivers or the trustees to perform in accordance with its terms would not work a forfeiture of the lease, because the parties at the time of the making of the lease expressly stipulated the breach of what conditions therein written should work a forfeiture of the lease, and made no stipulation regarding the advancement of money by the railway company to the bankrupt as was thereafter done. When the new agreement for such advancements was made it was not then stipulated the failure to repay such advances according to the terms of the subseduent agreement should work a forfeiture of the lease.

It follows, the decision of the referee is right and must be approved. It is so ordered.

No. 816. In Re Mount Carmel Coal Co., Decision Filed March 5th 1906. Morton Albaugh clerk, by F. L. Campbell, Deputy.

In the District Court of the United States for the Dis-
138 trict of Kansas First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt, on petition of The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company. In Bankruptcy.

Petition for Appeal.

The above named The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee

& Pittsburg Coal and Mining Company, conceiving themselves aggrieved by the decree rendered against them on this 12th day of March, 1906, in favor of Cyrus Leland Jr., J. E. Hurley and Walter Reeves, Receivers and Trustees in Bankruptcy of the Mount Carmel Coal Company on the petition of said petitioners filed in the above-entitled cause and matter, do hereby appeal from said order, judgment, ruling and decree of the District Court of the United States for the District of Kansas, First Division to the United States Circuit Court of appeals for the Eighth Circuit, for the reasons specified in the assignments of errors which is filed herewith; and the said The Atchison Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company pray that this appeal may be allowed and that a transcript of the record, proceedings and papers in which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit. In the meantime all proceedings are stayed upon the execution of bond in the sum of five hundred dollars to be approved by the Judge of said Court.

WM. R. SMITH,
O. J. WOOD,
Attorneys for The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company.

ROBERT DUNLAP,
Of Counsel.

Now, to-wit on this 12th day of March, 1906, it is ordered that the appeal be allowed as above prayed for.

139

JOHN C. POLLOCK,
District Judge.

Endorsed: No.816. In Re The Mount Carmel Coal Company, Bandrupt. Petition for Appeal. Filed March 12th, 1906.

MORTON ALBAUGH, Clerk.
By B. L. CAMPBELL, Deputy Clerk.

140 In the District Court of the United States for the District of Kansas First Division.

In the matter of the Mount Carmel Coal Company, Bankrupt, on petition of the Atchison, Topeka and Santa Fe Railway Company, the Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company.

In Bankruptcy.

Assignment of errors of Appeal.

And now on this 12th day of March, A. D. 1906, come The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, by Robert Dunlap, O. J. Wood and Wm. R. Smith, their Solicitors and allege and say that the order, judgment and decree in favor of Cyrus Leland, Jr., J. E. Hurley and Walter Reeves, receivers and later trustees in bankruptcy of the Mound Carmel Coal Company, Bankrupt, heretofore rendered in said cause on the petition of said petitioners, is erroneous and against rights of the said The Atchison, Topeke and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company for the following reasons. to-wit:

1. That the District Court of the United States for the District of Kansas, First Division, erred in holding that under the evidence the said petitioner, The Atchison, Topeka and Santa Fe Railway Company was not entitled to have delivered to it by the receivers and trustees in bankruptcy of said Mount Carmel Coal Company coal to the amount and value of $57,304.16 on account of the agreement made before said receivership between the said Mound Carmel Coal Company and the said The Atchison, Topeka and Santa Fe Railway Company.

2. That the said District Court erred in holding that
141 The Atchison, Topeka and Santa Fe Railway Company did not have an equitable right under the agreement made with it by the said Mount Carmel Coal Company to have an order made by said Court for the delivery to said Railway Company of coal to the amount of $57,304.16 for moneys to that amount advanced to said Mount Carmel Coal Company by said Railway Company, which said coal was agreed to be furnished to satisfy said advances made to said Mount Carmel Coal Company before its adjudication in bankruptcy.

3. That the Court erred in holding that there was no testimony indicating an intention to modify the written lease and contract to the extent that the advances made by the Railway Company to the Mount Carmel Coal Company were to be paid by the latter company in coal.

4. That the Court erred in holding that the verbal agreement between The Atchison, Topeka and Santa Fe Railway Company and the Mount Carmel Coal Company was seperate and independent from the contract and lease set out in the petition filed before the referee herein and contained in the record.

5. That the District Court erred in holding that the written lease and contract under which the receivers and trustees took possession of the coal mines operated by the Mount Carmel Coal Company before the receivers was not charged with the payment of the amounts paid by the petitioner, The Atchison, Topeka and Santa Fe Railway Company to the Mount Carmel Coal Company to satisfy its pay-rolls and to keep the mines described in said lease in a running condition.

6. That the District Court erred in denying the relief prayed for by the petitioners herein in their petition filed before the referee, which was that the said amount of money so advanced by the said The Atchison, Topeka and Santa Fe Railway Company should be paid to it in full by the delivery of coal by said receivers and trustees, or that the receivers and trustees be ordered and directed to deliver over the possession of all lands and properties described in said written contracts set forth in the petition, to the grantors and lessors mentioned and described in said contract.

7. That the said District Court erred in not ordering the said receivers and trustees in bankruptcy to turn over to the petitioners the property mentioned in the lease and contract contained in the record herein after said Court had decided that said The Atchison, Topeka and Santa Fe Railway Company was not entitled to be paid in full for the advances made by it to the Mount Carmel Coal Company by delivery of coal.

8. That the said District Court erred in denying and refusing to sustain the various assignments of error numbered one to six both inclusive, filed before N. H. Loomis, Special Referee in Bankruptcy.

9. That the said District Court erred in sustaining, affirming and approving the findings and report of the said N. H. Loomis, Special Referee in Bankruptcy,

10. That the said District Court erred in not setting aside and reversing the findings, conclusion and report of N. H. Loomis, Special Referee, to the effect that the petitioners are not and were not entitled to the relief prayed for in their petition filed before said referee.

Wherefore, Said petitioners, The Atchison, Topeka and Santa Fe Railway Company, the Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, pray that the said order, findings and decree be reserved and that said District Court may be directed to enter a decree
143 against the said Cyrus Leland Jr., J. E. Hurley, and Walter Reeves, receivers and trustees in bankruptcy of

the Mount Carmel Coal Company and in favor of The Atchison, Topeka and Santa Fe Railway Company.

ROBERT DUNLAP.
Of Counsel.

WM. R. SMITH,
O. J. WOOD,
Solicitors for the Atchison, Topeka and Santa Fe Railway Company.

Endorsed: No. 816. In Re The Mount Carmel Coal Company, Bankrupt. Assignment of Errors. Filed March 12th, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

144 In the District Court of the United States for the District of Kansas, First Division.

In the Matter of the Mount Carmel Coal Company, Bankrupt, on Petition of The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company.

In Bankrupcy.

Supersedeas Bond.

Know all men by these Presents, that The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company as principals and W. A. L. Thompson, of Topeka, Kansas, as surety, are held and firmly bound unto Cyrus Leland Jr., J. E. Hurley and Walter Reeves, Receivers and Trustees in Bankruptcy of The Mount Carmel Coal Company in the sum of five hundred dollars ($500.00) to be paid to said receivers and trustees as their interest may appear, to which payment well and truly to be made we bind ourselves jointly and severally and each of our successors and assigns jointly by these presents.

Dated this 10th day of March, 1906.

Whereas, the above named The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company have prosecuted their appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the final order, judgment and decree rendered in the above entitled matter and proceeding in favor of said Cyrus Leland Jr., J. H. Hurley and Walter Reeves, Receivers and Trustees in Bankruptcy of the Mount Carmel Coal Company, by the District Court of the United States, for the District of Kansas, First Division.

Now, therefore, the condition of this obligation is that if the above-named, The Atchison, Topeka and Santa Fe
145 Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, shall prosecute their appeal to effect and pay all costs and damages that may be adjudged and awarded before them if they shall fail to make their appeal in this obligation, otherwise in full force.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY AND THE CHEROKEE & PITTSBURG COAL AND MINING COMPANY.

By Wm. R. Smith,
their agent and attorney.
W. A. L. Thompson.

Taken and approved by me this 12th day of March, 1906.

JOHN C. POLLOCK, Judge.

Endorsed: No. 816. In Re the Mount Carmel Coal Company, Bankrupt. Bond. Filed Mar 12, 1906. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

146 In the District Court of the United States, for the District of Kansas, First Division.

In re Mount Carmel Coal Company, bankrupt.

On petition of the Atchison, Topeka and Santa Fe Railway Company, the Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company.

Stipulation.

It is agreed and stipulated between the Atchison, Topeka and Santa Fe Railway Company, a corporation, and James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, trustees in bankruptcy of the above-named bankrupt (heretofore receivers) for the purpose of shortening the record in this case, that on September 26th, 1905, the said Mount Carmel Coal Company, a corporation, was, by involuntary proceedings against it, adjudged a bankrupt, and that the said above-named persons were duly elected and appointed trustees of the estate of said bankrupt corporation on December 19th, 1905.

The Atchison, Topeka and Santa Fe Railway Company, et al.

By WM. R. SMITH,
Its attorney.

JAMES E. HURLEY,
CYRUS LELAND, Jr., and
WALTER REEVES,
Trustees.

By J. S. DEAN,
Their attorneys.

Endorsed, filed March 27, 1906. Morton Albaugh, clerk. by F. L. Campbell, Dept. Clerk.

United States of America,
147 District of Kansas —ss.

I, Morton Albaugh, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in case No. 816, in the matter of the Mount Carmel Coal Company, bankrupt, in bankruptcy, on petition of the Atchison, Topeka & Santa Fe Railway Company and others.

I further certify that the original citation is hereto attached and returned herewith.

Seal of U. S. District Court Dist. of Kansas.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 28th day of March, A. D. 1906.

MORTON ALBAUGH,
Clerk.

Filed April 12, 1906, John D. Jordan, Clerk.

(*Appearance of Counsel for Appellants.*)

On the twelfth day of April, A. D. 1906, an appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellants,
vs.
J. E. HURLEY ET AL., Trustees, &c.

The Clerk will enter my appearance as Counsel for the Appellants.

ROBERT DUNLAP.
WM. R. SMITH.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. Atchison, Topeka and Santa Fe Ry. Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Appearance. Filed Apr. 12, 1906. John D. Jordan, Clerk. Robert Dunlap, William R. Smith, Counsel for Appellants.

(*Appearance of Mr. Clifford Histed as Counsel for Appellees.*)

And on the twenty-eighth day of June, A. D. 1906, the appearance of Mr. Clifford Histed, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellants,
vs.
J. E. HURLEY ET AL., Trustees, &c.

The Clerk will enter my appearance as Counsel for the Appellees.

CLIFFORD HISTED.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. Atchison, Topeka & Santa Fe Ry. Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Appearance. Filed Jun. 28, 1906. John D. Jordan, Clerk. Clifford Histed, Counsel for Appellees.

(*Appearance of Mr. John S. Dean as Counsel for Appellees.*)

And on the second day of July, A. D. 1906, the appearance of Mr. John S. Dean, as counsel for appellees, was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,
vs.
J. E. HURLEY ET AL., Trustees, &c.

The Clerk will enter my appearance as Counsel for the Appellees.
JOHN S. DEAN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. The Atchison, Topeka and Santa Fe Ry. Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Appearance. Filed Jul- 2, 1906, John D. Jordan, Clerk. John S. Dean, Counsel for Appellees.

(*Argument Commenced.*)

And on the tenth day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

MONDAY, *December* 10, 1906.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,
vs.
J. E. HURLEY ET AL., Trustees, &c.

Appeal from the District Court of the United States for the District of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Robert Dunlap in behalf of the appellants, but the hour of adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the eleventh day of December, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

TUESDAY, *December* 11, 1906.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,
vs.
J. E. HURLEY ET AL., Trustees, &c.

Appeal from the District Court of the United States for the District of Kansas.

This cause having been called for further hearing, argument was continued by Mr. Robert Dunlap for the appellants and by Mr. John S. Dean for the appellees and concluded by Mr. Robert Dunlap for the appellants.

Thereupon the cause was submitted to the Court upon the transcript of record from said District Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twentieth day of March, A. D. 1907, an opinion of said United States Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2424, December Term, A. D. 1906.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,

vs.

J. E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt, Appellees.

Appeal from the District Court of the United States for the District of Kansas.

Mr. Robert Dunlap (Mr. Wm. R. Smith and Mr. Gardiner Lathrop were with him on the brief) for appellant.
Mr. John S. Dean for appellees.

Before Sanborn, Hook and Adams, Circuit Judges.

ADAMS, *Circuit Judge*, delivered the opinion of the court:

This was an appeal from an order of a court of bankruptcy in the District of Kansas denying to the Atchison, Topeka & Santa Fe Railway Company a claim for a preference against the assets of the Mt. Carmel Coal Company, bankrupt, or the alternative relief prayed for.

In 1896 the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, as parties of the first part, Charles J. Devlin as party of the second part and the Railway Company as party of the third part entered into an agreement whereby the parties of the first part leased for certain rents and royalties reserved, to Devlin for a term of three years certain coal lands situate in the State of Kansas with the right to mine coal therefrom, and the party of the second part agreed to sell and deliver to the Railway Company and the latter to buy from him daily all the coal required by it in the operation of certain of its lines of railroad in the State of Kansas at the prices stated in the lease, the same to be paid for by the Railway Company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the Railway Company to terminate the lease for failure by Devlin to perform any of his undertakings, and the right to assign the lease was made subject to the consent of the Railway Company.

Subsequently, Devlin duly assigned to the Mt. Carmel Coal Company all his rights under the lease. By two successive agreements between the latter Company and the other parties to the lease the same was extended with slight modification, unimportant now to mention, subject to all its original terms and conditions, until June, 1906. All the parties continued in the performance of their

respective obligations until July, 1905, when the Mt. Carmel Company was adjudicated a bankrupt. Receivers were duly appointed and authorized to conduct the business of the bankrupt in the usual course, until trustees should be chosen. The receivers and subsequently appointed trustees successively continued to operate the mines under orders of the court and in the language of the court below, "performed fully the terms of the contract as it is written with the Coal Company and the Railway Company."

While the receivers were in charge the Railway Company and the two Coal Companies, the original lessors, filed their joint intervening petition, setting forth their relations with the bankrupt under the contract of 1896 as extended, their rights thereunder as already stated and, in substance, that by an agreement had between them and the bankrupt the contract had been modified to the extent that the Railway Company had agreed that without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the bankrupt and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes, for coal thereafter to be delivered under and pursuant to the terms of the contract; that pursuant to that agreement and for the purposes stated, it had advanced $57,304.16 to the bankrupt with the understanding that it should be repaid by the delivery of coal under the contract, during the months of July and August, 1905; that the intervening bankruptcy proceedings of July 7th and the appointment of the receivers by the court alone prevented the bankrupt from carrying out its obligation and delivering the requisite coal to it.

The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them or that the receivers be directed to deliver to the Railway Company the amount of coal so paid for in advance by it. The intervening petition was referred to a referee who heard the proof and reported unfavorably to granting any relief, and his report was afterwards confirmed by the District Judge and the petition dismissed. The facts are not materially controverted.

The referee found and reported the amount claimed by the Railway Company, $57,304.16, had been advanced in the way shown by the proof, to enable the bankrupt to meet its pay rolls. He concluded as follows:

"I am unable to find any testimony indicating an intention to modify the written lease. There certainly was no express oral agreement to that effect. It is true the advances were to be paid by money due the Coal Company for coal furnished the Santa Fe Company, and the money instead of being paid under the terms of the written contract would be kept to reimburse the Santa Fe Company for money advanced."

The court in reviewing the action of the referee said:

"True, at the time the sums of money were advanced it was no doubt contemplated and *agreed by the parties that the bankrupt*

would repay the money by furnishing coal at the price of the coal measured in money by the terms of the contract and would furnish such coal in July and August as claimed, but at the time of the failure of the bankrupt the coal remained in the ground unmined."

From these facts the referee concluded that the verbal agreement was a separate independent parol contract and had nothing to do with the original contract as evidenced by the lease, and the court in affirming the referee's conclusion observed as follows:

"I am of opinion that the transactions by which the money was advanced by the treasurer of the Railway Company to the bankrupt were completed transactions by reason of which the bankrupt became indebted to the Railway Company for so much money and that such transactions are wholly independent of and separate and apart from the original contract between the parties. * * * The contracts under which the money was advanced created no lien upon any property for its repayment." * * *.

The supplemental agreement whereby provision was made for advance payments for coal to be thereafter delivered under the lease may or may not be properly called a modification of the original agreement. That is immaterial. What we are concerned about is not its name but its meaning, that is: what was the intent and purpose of the parties in making it. In arriving at such intent and purpose we should consider the situation of the parties and the facts and circumstances surrounding them in the light of which, and to effect which, the supplemental agreement was made. The clear intent and purpose of the main contract, so far as the Railway Company is concerned, was to make a reliable provision in advance for its daily necessities for a period of years,—a provision so important to the Railway Company itself and to the travelling public that it saw fit to secure and make it certain by stipulations giving it the right to veto any assignment of the lease or to declare a forfeiture of all the Coal Company's rights under the lease if it failed to observe its contract obligations. It appears that the Coal Company, while the contract was still in force and being executed, became embarrassed and unable to meet its payrolls; as a result it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the Railway Company, and which the latter imperatively required for its daily consumption. In this state of things the Railway Company agreed to waive its right to withhold payment for fifteen days after coal was delivered to it and pay for some of it before it was delivered; and the Coal Company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following, at the price fixed by the original contract. This arrangement made when the Coal Company was in embarrassed circumstances and obviously inspired by the necessity of meeting the payrolls and for the ultimate purpose of securing performance of the only part of the original contract in which the Railway Company was interested, namely: securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court

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that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

The contract after the new arrangement remained as before. The Coal Company still had a right to mine coal on the same terms and conditions as before and was bound to supply the daily needs of the Railway Company as before. The money paid in advance entitled the Railway Company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrangement interpreted in the light of the conditions surrounding the parties and as necessarily intended by them was to pledge a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge but the method of producing it was devised for the purpose of acquiring the needed money by the Coal Company and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed.

We cannot conceive it possible that the Railway Company with all the machinery for self-protection and security afforded by the original contract would, when the Coal Company became embarrassed financially, surrender that protection and security and voluntarily loan to the insolvent, money to produce its coal without any security whatsoever. Accordingly, we cannot agree with the learned trial court that the parties intended the advances to be independent transactions disconnected from the original lease and resulting only in simple contract debts or unsecured loans to the Coal Company. On the contrary, we think, as already stated, that the parties intended to appropriate and pledge to the Railway Company sufficient coal when mined to repay the advances made by it.

In the case of Fourth Street Bank *v.* Yardley, 165 U. S. 634, the facts were that the Keystone Bank solicited and received from the Fourth Street Bank $25,000 of gold certificates, agreeing to give its check against its reserve in the Tradesmen's National Bank therefor. Instead of doing so it gave in the exeution of the transaction a check against its general account in the last mentioned bank. The draft was duly presented for payment and payment was refused. It was held in the case which was brought to subject moneys in the hands of the receiver of the Keystone Bank to an equitable charge or lien in favor of the Fourth Street Bank, that inasmuch as it was the intention and agreement of the parties that the check drawn generally should be paid out of a particular fund, such check, as between the parties, should be treated as an equitable assignment

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of that fund to the extent necessary to pay the check. In its opinion the Supreme Court made the following observations:

"When we look at the situation of the parties and the character of the transaction disclosed by the facts just referred to, no difficulty is experienced in ascertaining the intent of the parties. Both were banking institutions—banks of deposit. They were located in the same city. * * * It cannot be doubted that a mere request for the loan by the Keystone Bank from the Fourth Street Bank would have been so surprising that the contract would not possibly have been made without a statement of the reason which rendered the request necessary. * * * The deduction arises that, as it cannot be reasonably conceived that the loan would have been made without reference to an assignment of the particular fund from which alone the hope of immediate payment was to be reasonably expected, the parties must have and did intend to create a particular appropriation, charge or lien on the property upon the faith of which they both dealt. * * * It is of course true that the method adopted to evidence the appropriation" (by the Keystone Bank) "was a check drawn generally upon the Tradesmen's Bank, but, as already stated, the authorities are clear that when it is established that it was the intention and agreement of the parties to a transaction that a check drawn generally should be paid out of a particular fund, such check, as between the parties, will be treated as though an order for payment out of a specific, designated fund."

To the same effect are the following cases: Hauselt *v.* Harrison, 105 U. S. 401; Carr *v.* Hamilton, 129 U. S. 252; Duplan Silk Co. *v.* Spencer, 53 C. C. A. 321, 115 Fed. 689; Erie R. C. *v.* Dial, 72 C. C. A. 183, 140 Fed. 689, and *In re* Cramond, 145 Fed. 976; Reeves *v.* Kimball, 40 N. Y. 299.

The foregoing are sufficient to show how far the courts have gone in declaring transactions, not made strictly in the conventional language of a mortgage or pledge, to be equitable charges in the nature of such mortgage or pledge, when it is necessary to do so in order to execute the intent and purpose of the parties.

It follows that if bankruptcy had not supervened the Railway Company could have enforced its claim for advances against the coal when mined by the Coal Company.

Does the bankruptcy of the latter Company deprive the former of the same remedy against the trustees?

The administration and distribution of the property of bankrupts is a proceeding in equity, (*In re* Rochford, 59 C. C. A. 388, 124 Fed. 182) and should be conducted on broad equitable lines with a view of recognizing and enforcing the rights of all parties claiming an interest in the estate, whether they be legal or equitable, or both. (*In re* Chase, 59 C. C. A. 629, 124 Fed. 753.)

The last cited case well expresses the broad and liberal spirit which pervades the bankruptcy act. It is there said by Circuit Judge Putnam in delivering the unanimous opinion of the Circuit Court of Appeals of the First Circuit, as follows:

"It is settled that a trustee in bankruptcy has no equities greater

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than those of the bankrupt and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. Williams' Law of Bankruptcy (7th Ed.) 191. Indeed, bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

See to the same effect the following cases: Hutchinson *v.* Le Roy, 51 C. C. A. 159, 113 Fed. 202, 205; Hutchinson *v.* Otis, 53 C. C. A. 419, 115 Fed. 937, 940; Batchelder & Lincoln Co. *v.* Whitmore, 122 Fed. 355.

The trustees stand in the shoes of the bankrupt. Whatever rights a third party had against the property of a bankrupt before adjudication, that party, in the absence of fraud or fixed liens created by state statutes in favor of others, has against his estate in bankruptcy. Hewit *v.* Berlin Machine Works, 194 U. S. 296; Thompson *v.* Fairbanks, 196 U. S. 516; Humphrey *v.* Tatman, 198 U. S. 91; York Mfg. Co. *v.* Cassell, 201 U. S. 344.

In Thompson *v.* Fairbanks, the Supreme Court said:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

In the light of these authorities we have no hesitation in holding that the equitable charge created by the parties before the bankruptcy of the Coal Company should be enforced against the estate in the hands of its trustees.

Counsel for the trustees contend that no lien, equitable or otherwise, was created by the subsequent agreement because it was not in writing and signed by the parties to be charged as required by section 3173 G. S. (Kas.), 1901, commonly known as the statute of frauds. We find it unnecessary to consider the interesting question debated at the bar whether the oral agreement was such a substantive modification of the original one as distinguished from a change in detail of performance, as required it to be in writing to conform to the statute in question. It sufficiently appears that the Railway Company fully performed its part of the agreement. It advanced the money as agreed but the Coal Company failed to repay it as agreed. Equity will not permit the statute of frauds to be invoked in favor of a party who has not performed his oral undertaking against one who, at his invitation and in reliance upon his promise has expended money and changed his situation. That would make the statute an instrument of fraud rather than a means to prevent it. It cannot be so employed. Swain *v.* Seamens, 9 Wall. 254;

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Brown on Stat. of Frauds, Secs. 457 to 460; Glass *v.* Hulbert, 102 Mass. 24, 36; Suggett's Adm'r. *v.* Carson's Adm'r., 26 Mo. 221; Winters *v.* Cherry, 78 Mo. 344, 349.

Another and conclusive answer to the trustees' contention in this case is found in their conduct on assuming the duties of their trust. They found an assignable executory contract in force between the bankrupt and the Railway Company; one that might be advantageous or disadvantageous to the estate. It was evidenced by writing but the parties had changed its mode of performance as already pointed out, so that as between them it consisted of the original instrument and the agreed modification.

It is well settled that trustees in bankruptcy are not bound to accept property or take over contracts which are onerous and unprofitable and which would burden rather than benefit the estate. In the execution of their trust they are confronted at the outset with the duty of electing whether to assume an existing executory contract, continue its performance and ultimately dispose of it for the benefit of the estate or to renounce it and leave the injured party to such legal remedies for the breach, as the case affords. American File Co. *v.* Garret, 110 U. S. 288, 295; Sparhawk *v.* Yerkes, 142 U. S. 1, 13; Sessions *v.* Romadka, 145 U. S. 29; Dushane *v.* Beall, 161 U. S. 515; Watson *v.* Merrill, 69 C. C. A. 185, 136 Fed. 359, 363; *In re* Chambers, Calder & Co., 98 Fed. 865; Mercantile Trust Co. *v.* Farmers Loan and Trust Co. 26 C. C. A. 383, 81 Fed. 254; Central Trust Co. *v.* Continental Trust Co. 30 C. C. A. 235, 86 Fed. 517.

If they elect to assume such a contract they are required to take it *cum onere*, as the bankrupt enjoyed it, subject to all its provisions and conditions, "in the same plight and condition that the bankrupt held it." York Mfg. Co. *v.* Cassell (*supra*), and cases *supra*.

Any valid modifications of a written contract which may have been made by the bankrupt before adjudication, whether oral or in writing, and whether known or unknown to the trustees, are binding upon them if they elect to assume and perform the contract. They take it subject to all equities between the original parties. Reeves *v.* Kimball, (*supra*); Wood *v.* Donovan, 132 Mass. 84; Homer *v.* Shaw, 177 Mass. 1; Mangles *v.* Dixon, 3 House of Lords Cases, 703. The duty rests upon the trustees to make inquiry and ascertain the true nature, character and conditions of the contract before exercising their election. When the election is made to assume it where no fraud has been practiced upon them, they stand in exactly the same situation as the bankrupt himself stood prior to the adjudication (cases *supra*).

After presumably making all the inquiries necessary to fully acquaint themselves as to the advisability of taking over the executory contract in question the trustees in this case determined to do so, assumed the contract and entered upon its execution. They mined coal, delivered it to the Railway Company, and, in the language of the trial court, "performed fully all the terms of the contract as it was written" but failed to conform to the condition created by the

oral agreement to deliver coal to the Railway Company in payment of the advances made by it to keep the mine going.

From the foregoing the conclusion follows that the learned trial court should have sustained the interveners' petition and surrendered to them the leased premises or required the trustees, upon the assumption of the lease, to perform the condition of mining and furnishing the Railway Company sufficient coal to cover its advances. Not having done so and the lease having expired so that it cannot now be done, the assets of the estate, consisting in part of money received for coal delivered to the Railway Company, should be subjected to the payment of such advances as a preferential claim. The decree is accordingly reversed and the cause remanded with instructions to proceed according to this opinion.

Hook, Circuit Judge, dissents.

Filed March 20, 1907.

(*Decree.*)

And on the twentieth day of March, A. D. 1907, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1906.

WEDNESDAY, *March* 20, 1907.

No. 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY, and THE CHEROKEE AND PITTSBURG COAL AND MINING COMPANY, Appellants,

vs.

J. E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Bankrupt.

Appeal from the District Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee and Pittsburg Coal and Mining Company have and recover against J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the

Estate of The Mount Carmel Coal Company, Bankrupt, the sum of Two Hundred Seventy-Eight and 75/100 Dollars for their costs in this behalf expended.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to proceed in accordance with the views expressed in the opinion of this Court.

March 20, 1907.

(*Petition of Appellees for Allowance of Appeal to Supreme Court U. S., and Order Allowing Same.*)

And on the sixteenth day of April, A. D. 1907, a petition of appellees for the allowance of an appeal to the Supreme Court of the United States and order allowing same, was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

In Equity. # 2424.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL., Appellants,

vs.

JAMES E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Appellees.

Petition on Appeal.

The above named appellees conceiving themselves aggrieved by the decree made and entered on the 20th day of March, 1907, in the above entitled cause, do hereby appeal from said order and decree to the United States Supreme Court, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the United States Supreme Court.

JOHN S. DEAN,
Attorney for Appellees.

The foregoing claim of appeal is allowed, conditioned upon the filing and approval of a bond in the sum of ——.

ELMER B. ADAMS,
Judge of the U. S. Circuit Court of Appeals, 8th Circuit.

(Endorsed:) No. 2424. The Atchison, Topeka and Santa Fe Railway Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, as Trustees, etc. Petition of Appellees for allowance of appeal to Supreme Court, U. S., and order allowing same. Filed Apr. 16, 1907, John D. Jordan, Clerk.

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(*Assignment of Errors.*)

And on the sixteenth day of April, A. D. 1907, an assignment of errors was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

In Equity. No. 2424.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL., Appellants,

vs.

JAMES E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, Appellees.

Assignment of Errors.

And now on this 16th day of April, A. D. 1907, come the said appellees by John S. Dean, their solicitor, and say that the judgment and decree in said cause is erroneous and against the just rights of the appellees, for the following reasons:

1st. Because the evidence showed that there was no modification of the original written contracts between the Mount Carmel Coal Company, bankrupt, and The Atchison, Topeka & Santa Fe Railway Company and the Cherokee & Pittsburg Coal and Mining Company.

2nd. Because the evidence in the case showed that the money advanced by The Atchison, Topeka & Santa Fe Railway Company to the Mount Carmel Coal Company was a simple loan without security.

3rd. Because the evidence in the case showed that the claim of The Atchison, Topeka & Santa Fe Railway Company constituted nothing more than an ordinary unsecured claim against the bankrupt estate.

4th. Because the evidence showed that there was no pledge on the part of the bankrupt of any of its property, in existence, to secure The Atchison, Topeka & Santa Fe Railway Company for money advanced by it to the bankrupt.

5th. Because the evidence in the case showed that the money advanced by The Atchison, Topeka & Santa Fe Railway Company to the Bankrupt, was not advanced upon the strength of any security offered, or pledged, by the bankrupt.

6th. Because the evidence showed that the coal, upon which the said Atchison, Topeka & Santa Fe Railway Company claimed a lien, was not mined at the time the money was advanced by the said Railway Company to the bankrupt, but was still in the ground and a part of the real estate.

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7th. Because the evidence showed that there was no agreement, or understanding, between The Atchison, Topeka & Santa Fe Railway Company and the bankrupt, that a failure on the part of the bankrupt to repay advances made to it by the said Railway Company, should authorize the said Railway Company to avoid the provisions of the written contracts between the parties, and forfeit the rights of the bankrupt to the possession and enjoyment of the leased premises.

8th. Because the evidence showed that whatever agreement was made between The Atchison, Topeka & Santa Fe Railway Company and the bankrupt, at the time the money was advanced to the bankrupt by the said Railway Company, was a simple, oral contract between the parties for the repayment of said money, and had no dependence upon, and was in no way a modification of, or supplemental to, the written contracts between The Atchison, Topeka & Santa Fe Railway Company and Cherokee & Pittsburg Coal and Mining Company, and the bankrupt.

9th. Because the evidence showed that there was no agreement between The Atchison, Topeka & Santa Fe Railway Company and the bankrupt by which the said Railway Company agreed from time to time to advance money to the bankrupt for any purpose.

10th. Because the evidence failed to show that there was any coal mined and in the possession, or under the control, of the bankrupt at the time of the adjudication in bankruptcy to which any lien could be attached in favor of The Atchison, Topeka & Santa Fe Railway Company as security for money advanced by the said Railway Company to the bankrupt.

11th. The court erred in holding that The Atchison, Topeka & Santa Fe Railway Company was entitled to a preference for the amount of its claim out of all of the assets of the bankrupt's estate, and as against the general creditors of the estate.

12th. Because the court erred in holding that the claim of The Atchison, Topeka & Santa Fe Railway Company constituted an equitable lien upon coal mined by the Receivers and Trustees upon the leased premises at the expense of the bankrupt estate.

13th. Because the court erred in holding that the Receivers and Trustees in bankruptcy were legally bound upon the demand of The Atchison, Topeka & Santa Fe Railway Company and the Cherokee & Pittsburg Coal and Mining Company, to either deliver the possession of the leased premises to said Companies, or to produce and deliver to said Railway Company sufficient coal to repay to the Railway Company the amount of money loaned by it to the bankrupt, when the cost of producing such coal and delivering the same would have to be paid by the said Trustees and Receivers, out of the funds provided for the administration of the bankrupt estate.

14th. Because the court erred in holding that a lien could be created by an oral agreement between the bankrupt and The Atchison, Topeka & Santa Fe Railway Company, upon coal unmined and still a part of the real estate.

15th. Because the court erred in holding that the oral agreement

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creating a lien upon real estate was not void under the Statute of Frauds.

16th. The said court erred in reversing the judgment of the District Court of the United States for the District of Kansas, in favor of the appellees when it should have affirmed the judgment of said court according to the law of the land.

Wherefore the appellees pray that said judgment and decision of the Circuit Court of Appeals of the United States for the Eighth Circuit, be reversed, and that the said court may be directed to enter a decree affirming the judgment and decision of the United States District Court for the District of Kansas.

JOHN S. DEAN,
Solicitor for Appellees.

(Endorsed:) No. 2424. The Atchison, Topeka and Santa Fe Railway Co., *et al.*, Apellants, *vs.* J. E. Hurley, *et al.*, as Trustees, etc. Assignment of Errors. Filed Apr. 16, 1907. John D. Jordan, Clerk.

(*Supersedeas Bond.*)

And on the ninth day of May, A. D. 1907, a supersedeas bond was filed in the Clerk's office of said Circuit Court of Appeals in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2424.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, THE OSAGE CARBON COMPANY, and THE CHEROKEE & PITTSBURG COAL AND MINING COMPANY, Appellants,

vs.

JAMES E. HURLEY, CYRUS LELAND, JR., and WALTER REEVES, Trustees in Bankruptcy of the Estate of the Mount Carmel Coal Company, a Bankrupt, Appellees.

Know all men by these presents, that we, James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as Trustees of the Estate of the Mount Carmel Coal Company, a bankrupt, principals, and B. P. Waggener as surety, are held and firmly bound unto the appellants, The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company, in the full and just sum of Two Thousand Dollars ($2,000), to be paid to the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company, their successors or assigns;

To which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 19 day of April, A. D. 1907.

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Whereas lately, to-wit, on the 20th day of March, 1907, at the United States Circuit Court of Appeals, for the Eighth Circuit, in a suit pending in the said court between The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company and The Cherokee & Pittsburg Coal and Mining Company, appellants, and James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as Trustees of the Estate of the Mount Carmel Coal Company, a bankrupt, appellees, a judgment and decree was rendered against the said James E. Hurley, Cyrus Leland, Jr., and Walter Reeves, as Trustees of the estate of the Mount Carmel Coal Company, a bankrupt, reversing a judgment and decree of the United States District Court for the District of Kansas, theretofore rendered in said United States District Court for the District of Kansas, in favor of said Trustees and against the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company; and

Whereas the said Trustees having been granted an appeal from said judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, in the aforesaid suit, to the United States Supreme Court; and having obtained a citation directed to the said The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal and Mining Company, citing and admonishing them to be, and appear, in the United States Supreme Court at the City of Washington, District of Columbia, within the time limited in said citation;

Now, the condition of the above obligation is such, that if the said Trustees shall prosecute said appeal to effect and answer all damages and costs if they fail to make said plea good, and to secure a reversal of the judgment and decree of the said United States Circuit Court of Appeals, in said case, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, the said obligators have hereunto set their hands.

J. E. HURLEY,
CYRUS LELAND, JR.,
WALTER REEVES,
Trustees of The Estate of The Mt. Carmel Coal Company, Bankrupt.
B. P. WAGGENER.

Approved:
ELMER B. ADAMS,
Judge of the United States Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) No. 2424. The Atchison, Topeka and Santa Fe Railway Co., *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Supersedeas Bond. Filed May 9, 1907, John D. Jordan, Clerk.

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(*Order Approving Bond on Appeal.*)

And on the ninth day of May, A. D. 1907, an order approving bond on appeal was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2424. May Term, 1907.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,
Appellants,
vs.
J. E. HURLEY ET AL., Trustees, &c.

Appeal from the District Court of the United States for the District of Kansas.

Now come the appellees herein and present a bond upon their appeal to the Supreme Court of the United States in the penal sum of $2,000.00.

Thereupon it is ordered that said bond be, and it is hereby, approved and by consent of the parties it is ordered that the same act as a supersedeas.

May 9, 1907.

ELMER B. ADAMS,
U. S. Circuit Judge, Eighth Circuit.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2424. The Atchison, Topeka & Santa Fe Railway Company, *et al.*, Appellants, *vs.* J. E. Hurley, *et al.*, Trustees, &c. Order approving bond on appeal. Filed May 9, 1907, John D. Jordan, Clerk.

(*Citation on Appeal.*)

And on th[illegible]nth day of May, A. D. 1907, the citation on appeal was filed in t[illegible] Clerk's office of said Circuit Court of Appeals in said cause, the original of which with the acknowledgment of service attached thereto, is in the words and figures following, to-wit:

THE UNITED STATES OF AMERICA:

To The Atchison, Topeka and Santa Fe Railway Company, The Osage Carbon Company and the Cherokee & Pittsburg Coal and Mining Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, D. C., thirty days from and after the day this Citation bears date,

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pursuant to an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit wherein J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, are appellants, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer B. Adams, judge of the United States Circuit Court of Appeals for the Eighth Circuit, this sixteenth day of April, in the year of our Lord one thousand nine hundred and seven.

ELMER B. ADAMS,
Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

I hereby acknowledge that the above citation on appeal was served upon me the 17th day of April, 1907.

ROBERT DUNLAP,
Attorney for The A. T. & S. F. Rly. Co., The Osage Carbon Company, and the Cherokee & Pittsburg Coal and Mining Company.

[Endorsed:] No. 2424. United States Circuit Court, of Appeals for the Eighth Circuit. J. E. Hurley *et al.*, Trustees, &c., Appellants, *vs.* The Atchison, Topeka and Santa Fe Railway Co. *et al.* Citation on Appeal. Filed May 9, 1907, John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing one hundred forty-one pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said United States Circuit Court of Appeals, in a certain cause in said Court wherein The Atchison, Topeka & Santa Fe Railway Company *et al.*, were Appellants, and J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of The Mount Carmel Coal Company, Bankrupt, were Appellees, No. 2424, December Term, 1906, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation, with the acknowledgment of service attached thereto, is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

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Circuit, at office in the City of St. Louis, Missouri, this eleventh day of May, A. D. 1907.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 20,728. U. S. circuit court of appeals, 8th circuit. Term No. 326. J. E. Hurley, Cyrus Leland, Jr., and Walter Reeves, trustees in bankruptcy of the estate of The Mount Carmel Coal Company, bankrupt, appellants, *vs.* The Atchison, Topeka & Santa Fe Railway Company, The Osage Carbon Company, and The Cherokee & Pittsburg Coal & Mining Company. Filed May 23d, 1907. File No. 20,728.

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